No. Pro. Pet.

Brief of Maxwell for Petitioner

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 815

THOMAS M. ADAMS and E. C. MEANS, Executors with the will annexed of the estate of THOMAS W. MEANS, deceased,

Appellants,

vs.

BENJAMIN R. COWEN, EVAN F. WILLIAMS and A. S. FRAZER, Trustees, *Appellees.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Printed by JAMES BARCLAY, 108-118 Canal St., Strobridge Building, Cincinnati, O.

Supreme Court of the United States.

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No.

THOMAS M. ADAMS and E. C. MEANS, Executors with the will annexed of the estate of THOMAS W. MEANS, deceased,
Appellants,

vs.

BENJAMIN R. COWEN, EVAN F. WILLIAMS and A. S. FRAZER, Trustees, *Appellees*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Supreme Court of the United States:

The Appellants respectfully pray for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Sixth District, and annex hereto a statement of the case and of their grounds for the petition. They file printed copies of the record in the Circuit Court of Appeals, and a certified transcript of the proceedings in that court.

LAWRENCE MAXWELL, JR.
Of Counsel for the Petitioners.

JULIUS L. ANDERSON,
JOHN F. HAGER,
Of Counsel.

STATEMENT OF THE CASE.

Thomas W. Means, a resident of Kentucky, died testate June 8, 1890, leaving four children, John Means, William Means, Margaret Means and Mary A. Adams, and one grandson, the only child of a deceased daughter. He devised his estate equally between these four children and his grandson. The controversy arises upon the fifth clause of his will, to wit [Record, 48]:

"Item 5. I have made advances to my said children, which are charged to them respectively on my books, and I may make further advances to them respectively, or to some of them, and to my said grandson, which may be charged on my books to their respective accounts; I desire the equal provision herein made for said children, and the provision for said grandson to be a provision for them respectively, in addition to said advances made, and that may hereafter be made, and that in the division, distribution and settlement of my said estate, said advances made, and that may hereafter be made, be treated not as advancements but as gifts, not in any manner to be accounted for by my said children and grandson, or the issue of any of them."

The advances referred to in the foregoing clause were advancements of over $100,000, which the testator had already made to each of his children, including William. Subsequently, in 1884, he made further advancements so that each child, including William, had received $180,000, and with that the testator closed his advancement accounts on his books. He was then over seventy.

Subsequently, commencing in 1888, and within a period of sixteen months of the testator's death, one of his children, William Means, *borrowed* from him the sum of $280,311.42, for which he executed promissory notes, payable with interest to the order of the father. Some of the notes were secured by collaterals and others stated on their face that they were to be charged against and deducted from the maker's share as legatee of his father. William Means made payments on these notes

so as to reduce the balance due upon them to $136,035.75. After his father's death he made a settlement with the administrators (the appellants), giving the following receipt:

"Ashland, Ky., October 16, 1890.

Received of Thomas M. Adams and E. C. Means, administrators with the will annexed of the estate of Thomas W. Means, deceased, the sum of one hundred and thirty-six thousand and thirty-five and 75-100 dollars, being a part of my distributable share as legatee under said will applied by them as ordered by me upon the following notes and claims owed by me to the estate of said decedent, and payable to his order, viz:

[Here follows description of ten notes, with balance due on each, aggregating $136,035.75.]

This receipt is given in pursuance of settlement made October 16, 1890.

WILLIAM MEANS.

Attest: John F. Hager.
A. E. Lampton."

The present suit is brought by persons claiming to be assignees of William Means, to recover his full fifth share in his father's estate, in disregard of the foregoing settlement, and without deduction of the amount due upon his notes. The Circuit Court dismissed the bill, holding that the balance due on the notes were proper off-sets against William Means' share of his father's estate. The Court of Appeals, reversing the decree of the Circuit Court, held that the plaintiffs, as assignees of William Means, are entitled to recover his full fifth share without deduction of his debt of $136,035.75. In other words, they give to William Means' assignees a double portion of the estate.

I.

The Court of Appeals admit that the money represented by William Means' notes was not a gift or advancement, but that it was a loan or *debt* which might have been enforced against

him by his father during his lifetime, but that the *loan* was forgiven and discharged under the fifth clause of the will.

We submit that the fifth clause of the will does not cancel *debts* due from children to the testator, but that it relates simply to *advancements.*

This is conformable to the notions of justice, which from the earliest times have led courts of chancery to bend their energies (whether in interpreting wills or administering estates) so as to secure equality among children. The same public policy is disclosed in the statutes which everywhere require children to account for advanced portions. It is true that the testator meant to give his children the benefit of certain advances, but his dominating purpose was equality, and that provision was not meant to work a double or triple portion.

Under the Court of Appeals' construction of the fifth clause of the will, William Means gets a *double portion;* and if his father had died before the original advances of $280,311.42 had been reduced by payments thereon to $136,035.75, he would have gotten his equal share as legatee, and $280,000 in addition. If the $280,000 had been paid to him as a *gift* or *advancement*, that would be a proper result. But the question is whether the testator meant by the fifth clause to convert into a gift what he had advanced to a child, not by way of gift but by way of *loan* upon the distinct understanding that it should be repaid to him.

We are not confronted with any question of fact under this head, because the Circuit Court of Appeals find that William Means' notes evidenced *debts*, and not advancements.

To some of the notes were attached agreements in the following form [Record, 212]:

"The above is for money loaned to me by Thomas W. Means, on account of my indebtedness as executor and trustee of the estate of A. Labrot, deceased, and it is agreed as part of the transaction by which I have procured a loan of $45,000 upon the foregoing note, that the amount thereof and all interest shall

be paid from my interest as devisee or distributee of the estate of Thomas W. Means.

WILLIAM MEANS."

The Court of Appeals ignores these express charges on the legacy on grounds not mentioned in the bill. The only evidence on the subject is that of the attorney who prepared and advised the contract, viz:

"We advised Mr. John Means to use this form of note with the writing attached, *that it might clearly and beyond question, under any construction of the fifth clause of the will*, appear that the money so furnished his brother should be a loan, and in no sense an advancement under the terms of that will." (R. 727, 728.)

It is well settled that a legatee's receipt is evidence of the character of the advance, and to show that it was made on account of the legacy. Cowles vs. Cowles, 56 Conn. 240.

If this court is of opinion that William Means, under the fifth clause of the will was not entitled to deduct from his legacy these *debts* due from him to his father, especially in view of the agreements under which the loans were obtained, the judgment of the Court of Appeals must be reversed, because it is concede i that the administrators are entitled to set off debts against the legacy.

II.

But assuming that William Means' debts were not (as an original proposition) set-offs against his legacy, the question remains whether the settlement made by him October 16, 1890, with the administrators, can be set aside. The bill seeks to set this settlement aside upon the ground that the plaintiffs were prior assignees of William Means' interest in his father's estate, and that the settlement between the administrators and William Means was made in collusion with William Means in fraud of

the plaintiff's rights as the real owners of the legacy. The Circuit Court of Appeals do not find that William Means had made an assignment of his legacy to the plaintiff prior to his settlement of October 16, 1890. They set the settlement aside on the ground that the administrators were trustees of William Means and not competent to accept from him a settlement by which he relinquished an interest in the estate to which as matter of law (assuming that his *debt* was not deductible from his legacy) he was entitled.

No such ground for setting aside the settlement is alleged in the bill. If it were alleged, the decision of the Court of Appeals ignores the proposition that it is competent for persons to adjust a disputed claim and that it is no ground for setting aside such a settlement that the claim settled is not well founded in point of fact.

In Callisher vs. Bischoffsheim, L. R. 5 Q. B. 449, which is the leading English case, the defendant being sued on a promise made in consideration of the compromise of a claim, set up that at the time of the compromise agreement, nothing was in fact due to the plaintiff. But the court sustained a demurrer to the plea.

Blackburn, J., said:

"If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated."

Cockburn, C. J., said:

"If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. * * *

"It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it; in that case his conduct would be fraudulent."

In Stewart vs. Stewart (6 Cl. & F. 911, 966), Lord Chancellor Cottenham quotes with approval the following words of Lord Hardwicke, approving the doctrine of Lord Macclesfield:

"An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on the one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation for an agreement."

"If the solemn compromise of the parties is made to depend on the question whether the parties have so settled the dispute as the law would have done, then it may be truly said that a compromise is an unavailing, idle act, which questions even the power of the parties to bind themselves." Fisher vs. May, 2 Bibb, 448.

Union Bank of Georgetown vs. Geary, 5 Pet. 99, involved an agreement under which the endorser of a note had waived all defence and permitted a judgment to go against her upon the promise of the plaintiff that it would issue an execution immediately against the maker, who was represented to have property sufficient to satisfy the judgment. The plaintiff having failed to keep its agreement by issuing execution, sought to escape from the consequences of its breach by insisting that the indorser had in fact no good defence and that her agreement to waive defence and suffer judgment was therefore no consideration. But this court held that the consideration was sufficient, even though one of its own later decisions showed that the defence of the endorser (which alleged the insufficiency of a demand made on the fourth instead of the third day of grace) could not have prevailed. Mr. Justice Thompson said:

"It is unnecessary to examine whether this defence would have been available or not. The validity of the contract did not depend upon that question. It is enough that the bank considered it a doubtful question, and that they supposed they were gaining some benefit by foreclosing all enquiry on the

subject. . . . To permit a subsequent judicial decision on this point in their favor, as having a retrospective effect, so as to annul a settlement or agreement made by them under a different state of things, would be sanctioning *a most mischievous principle.*"

But it is just this "most mischievous principle" that the Court of Appeals recognizes when it permits William Means' assigns to repudiate the settlement of October 16th, because that court if of opinion that the claim of the administrators, which he then settled, could not have prevailed if contested.

The settlement was made by William Means under the advice of competent counsel, and after protracted negotiations with the administrators.

We respectfully submit:

1. That William Means is not entitled to a double portion, but that his *debt* of $136,035.75 to his father's estate should be deducted from his legacy.

2. That the question whether he was entitled to such a deduction was settled by an agreement between the administrators and himself, acting under the advice of counsel, and that no ground was presented by the bill and found by the court for setting the settlement aside.

LAWRENCE MAXWELL, JR.
Of Counsel.

In the opinion denying the rehearing, the court of Appeals says:

"This court did not find that there was any fraudulent combination between the administrators and William Means in making the settlement of October 16, 1890, to defeat the rights of the beneficiaries under the complainants' trust, and to that extent practically sustained the defendants' contention; but upon other grounds held that the complainants were entitled to recover the amount of the legacy."

In other words, the court ignores the bill as framed, and sustains it simply as a bill to recover a legacy. This was clearly error.

1. Because William Means' legacy had not been assigned to the plaintiffs prior to the filing of their bill.

2. The will provides that no final settlement can in any event be required before three years after the testator's decease. The bill was filed before that time. In In re Spencer (16 R. I. 25, 31) it was held that where a testator had declared that his executors "should have five years in which to settle his estate," a legatee could not maintain a suit for his legacy within that time.

No. 113.

Brief of Maxwell for Petitioner

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Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 113.

THOMAS M. ADAMS and E. C. MEANS, Administrators of THOMAS W. MEANS, *Petitioners*,

vs.

BENJAMIN R. COWEN, EVAN F. WILLIAMS and A. S. FRAZER, *Trustees*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

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BENJAMIN R. COWEN, EVAN F. WILLIAMS and A. S. FRAZER, *Trustees*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

STATEMENT OF THE CASE.

Thomas W. Means, a resident of Ashland, Kentucky, died there testate, on June 8, 1890, aged 87, leaving an estate, consisting chiefly of personal property, which was subsequently appraised (including the notes of his son, William Means, for $136,035.75), at $752,302.41 (Rec. 139-141). He left four children, John Means, William Means, Margaret Means, and Mary A. Adams, and one grandson, Thomas M. Culbertson, the only child of a deceased daughter. After directing that his household effects should be equally divided in kind between his four children, he devised the residue of his estate of every kind and wheresoever situated, of which he should die possessed,

equally between his four children and his grandson. The next clause of the will, which is dated July 20, 1880, is the clause under which the controversy at bar arises. It provides as follows (Rec. 37):

"Item 5. I have made advances to my said children which are charged to them respectively on my books, and I may make further advances to them respectively, or to some of them, and to my said grandson, which may be charged on my books to their respective accounts. I desire the equal provision herein made for said children, and the provision for said grandson, to be a provision for them respectively, in addition to said advances made, and that may hereafter be made and that in the division, distribution and settlement of my said estate said advances made, and that may hereafter be made, be treated not as advancements but as gifts not in any manner to be accounted for by my said children and grandson, or any of them, or the issue of any of them."

The advances referred to in the foregoing clause were *advancements* which the testator had made from time to time during a long course of years, to each of his children, including William. Some had received more than others. John, the oldest had received $159,314.36; William, next oldest, $138,409.54; Mary A. Adams, $131,207.48; Margaret, $122,401.35; and Sarah J. Culbertson, who had died in 1874, $109,609.82. After the date of the will (July 20, 1880), the testator made further advancements, equalizing the children, so that by May 14, 1884, each child had received in all just $180,000; and with that the testator balanced and closed his advancement accounts on his books. He was then 81 years of age.

Four years afterwards, viz: in 1888, one of his children, William Mears, *borrowed* from him the sum of $280,311.42, for which he executed promissory notes, payable with interest to the order of the father. Some of the notes were secured by collaterals and others stated on their face that they were to be charged against and deducted from the maker's share as legatee of his

father. William Means made payments on these notes during his father's life-time, so as to reduce the balance due upon them to $136,035.75. After his father's death he made a settlement with the administrators, giving the following receipt (Rec. 29):

Ashland, Ky., October 16, 1890.

Received of Thomas M. Adams and E. C. Means, administrators with the will annexed of the estate of Thomas W. Means, deceased, the sum of one hundred and thirty-six thousand and thirty-five and 75-100 dollars, being a part of my distributable share as legatee under said will applied by them as ordered by me upon the following notes and claims owed by me to the estate of said decedent, and payable to his order, viz:

[Here follows description of ten notes, with balance due on each, aggregating $136,035.75.]

This receipt is given in pursuance of settlement made October 6th, 1890.

William Means.

Attest: John F. Hager.
A. E. Lampton.

The present suit was brought against the administrators in the Circuit Court of the United States for the district of Kentucky, by persons who claim to be assignees of William Means, to recover his full fifth share in his father's estate, in disregard of the foregoing settlement, and without deduction of the amount due upon his notes. The Circuit Court dismissed the bill, holding that the balances due on the notes were proper off-sets against William Means' share of his father's estate. The Circuit Court of Appeals, reversing the decree of the Circuit Court, set aside the settlement of October 16, 1890, between William Means and the administrators, and held that the plaintiffs, as assignees of William Means, were entitled to recover his full fifth share of the estate without deducting his debt of $136,035.75. In other words, that court gave William Means' assignees a double portion of the estate.

The Court of Appeals did not find that the money represented by William Means' notes was a gift or advancement, but on the contrary that it was a loan or *debt* which might have been enforced against him by his father during his life-time, but held that the *loan* was forgiven and discharged by the fifth clause of the will.

Assignment of Errors.

We respectfully submit that the Circuit Court of Appeals erred,

1. In reversing the decree of the Circuit Court.

2. In holding that William Means' debt to his father was forgiven by the fifth clause of the will.

3. In setting aside the settlement of October 16, 1890.

Argument.

We contend that the fifth clause of the will does not cancel debts due from children to the testator, but that it relates simply to *advancements*.

This is conformable to the notions of justice, which, from the earliest times, have led courts of chancery to bend their energies (whether in interpreting wills or administering estates) so as to secure equality among children. The same public policy is disclosed in the statutes which everywhere require children to account for advanced portions. It is true that the testator meant to give his children the benefit of certain "advances," but his dominating purpose was equality, and that provision was not meant to work a double or triple portion.

Under the Circuit Court of Appeals' construction of the fifth clause of the will, William Means gets a *double portion;* and if his father had died before the original advances of $280,311.42 had been reduced by payments thereon to $136,035.75, he would have gotten his equal share as legatee, and $280,000 in addition. If the $280,000 had been paid to him as a *gift* or *advancement*, we could not complain of the result. But the question is whether

the testator meant by the fifth clause to convert into a gift what he had advanced to a child, not by way of gift, but by way of *loan* upon the distinct understanding that it should be repaid to him.

We are not confronted with any question of fact under this head, because the Circuit Court of Appeals found that William Means' notes evidenced *debts*, and not advancements.

To some of the notes were attached agreements in the following form [Rec. 164]:

"The above is for money loaned to me by Thomas W. Means, on account of my indebtedness as executor and trustee of the estate of A. Labrot, deceased, and it is agreed as part of the transaction by which I have procured a loan of $45,000 upon the foregoing note, that the amount thereof and all interest shall be paid from my interest as devisee or distributee of the estate of Thomas W. Means. William Means."

I.

William Means' notes evidenced debts and not advancements.

Both the Circuit Court and the Circuit Court of Appeals have so found. In view of "the settled doctrine of this court that the concurrent decisions of two courts upon a question of fact will be followed, unless shown to be clearly erroneous," the issue of fact as to whether William Means' notes represent debts or advancements is hardly open for discussion in this court. The Carib Prince, 170 U. S. 655, 658. Stuart vs. Hayden, 169 U. S. 1. Baker vs. Cummings, 169 U. S. 189.

1. But assuming that the question is open, we submit, in the first place, that it is not competent to contradict by parol testimony the plain terms of a written contract which promises to repay money with interest, so as to convert that definite promise into a mere memorandum of an advancement. Haggard vs. Hays'

Adm'r, 13 B. Monr. 175. Grey vs. Grey, 22 Ala. 233. Fennell vs. Henry, 70 Ala. 484. Barton vs. Rice, 22 Pick. 508. We do not find the question decided in England. In Hill vs. Wilson, 8 Ch. 888, the Court of Appeal refused to convert a note into an advancement upon the parol evidence of the maker, the court doubting whether it would "be possible on any evidence, to take away the right to sue on the note, there being no mistake" (p. 899).

There are some contrary decisions, but not from courts of the highest authority. The precise question as applied to advancements has never been decided, so far as we know, in the federal courts, but the doctrine, well established in this court, against the admission of parol evidence to control or affect in any manner the plain terms of a promissory note would seem, on principle, to forbid the introduction of parol evidence for the purpose of converting a promissory note into a memorandum of advancement. Specht vs. Howard, 16 Wall. 564; Forsythe vs. Kimball, 91 U. S. 291; Brown vs. Spofford, 95 U. S. 474; Seitz vs. Brewers' Co., 141 U. S. 510; Allen vs. Furbish, 4 Gray, 504; Davis vs. Randall, 115 Mass., 547, 551.

This view is not in conflict with Burke vs. Dulaney, 153 U. S. 228, where it was held that the *delivery* of a promissory note may be shown by parol to have been conditional.

2. At any rate, a promissory note is prima facie evidence of debt, and if parol evidence is admissible at all, it must be clear and convincing to contradict the legal presumption.

Most of the notes at bar were sent by William Means by mail, and the letters are in evidence. They show an absolute and unconditional delivery of the notes. Concerning those which were not delivered by mail there is no evidence to rebut the presumption of debt raised by the possession of the notes by the payee.

The first note is as follows (Rec. 163):

Cincinnati, O., Feb. 15th, 1888.

Due Thomas W. Means or order one hundred and twenty-five thousand nine hundred and eleven, and 74-100 dollars, with interest from date.

$125,911.74. William Means.

On February 15, 1888, John Means, as agent of his father, Thos. W. Means, paid for William Means to the receiver of the Metropolitan National Bank of Cincinnati, said sum of $125,911.-74 to take up William Means' notes for that amount, then held by said receiver. The notes were secured by collaterals belonging to William Means, which John got from the receiver when he paid the notes. John returned to his home at Ashland, Kentucky, that night. On the following day he wrote William Means as follows (Rec. 395):

February 16th, 1888.

Dear Will:

I reached home 1 p. m. to-day. Hattie and Cook came last night. Have not seen father or Maggie—will see them to-night. Have been busy this afternoon making entries of my transactions yesterday, examining, sorting and listing notes and collaterals. My payments yesterday for you amounted to one hundred and twenty-five thousand, nine hundred eleven 74-100 ($125,911.74) dollars. *I think you had better send me note at one day in father's favor for the amount.*

Had a talk with E. F. Williams on my way up, and when I explained to him he agreed with me that this is best to close up the matter at present. He may write you. Will try to send you $1,000.00 to-morrow or next day. Almost train time.

Yours truly,

John Means.

On February 20, not having received an answer to his foregoing letter of the 16th, John wrote to William as follows (Rec. 360):

Ashland, Ky., 20th February, 1888.

Wm. Means, Esq.,
Cincinnati, O.

My Dear Will:—Herewith find forms which explain themselves. Please copy, sign and return to me at your earliest convenience. Also the receipts for cash paid. The sixty-nine (69) shares Big Sandy Pkt. Co. were credited to your "current %" on father's books. There will be need to sell some of the securities to get money to pay what we have borrowed. I also think it best for you to have as herewith indicated, fearing suits be brought against you and other directors which may give you trouble as it now stands. Father is growing more feeble and almost blind. Has seen his children and others for the last time unless an operation restores his sight again. All well, with love to Martha.

Yours truly,
John Means.

The forms referred to and enclosed in the above letter were a pencil draft of the note for $125,911.74, as subsequently executed, and the following draft of a power of attorney which was also subsequently executed (Rec. 115, Exhibit 6).

Cinti., 15th Feby., 1888.

J. M. I hereby give you full power and authority to sell or collect at my expense, all or any portion of the securities pledged by me, to the Metropolitan National Bank of Cincinnati, O., to secure the payment of my notes and of notes endorsed by me, which notes you have thus paid to the amount of one hundred and twenty-five thousand nine hundred and eleven 74-100 ($125,911.74) dollars. I hereby give you full power and authority to sell or collect all or any portion of said securities at any place, either in the city of Cincinnati or elsewhere, at public or private sale at your option at any time hereafter without advertising the same or otherwise giving me any notice.

Before receiving an answer to either of the two foregoing letters, John wrote William a third letter (Rec. 107).

Ashland, Ky., 21st February, 1888.

William Means, Esq.,
Cincinnati, O.

Dear Will: I wrote you yesterday inclosing papers. Am anxious to close up this matter this week. As I propose to leave Saturday, 25th inst., for N. Y. city, returning on or about 3d prox. My address in N. Y. will be 31 Burling Slip. *I desire to have the note to father and to make proper entries on his books and my own before leaving here.* Have transferred to father stocks, viz:

69 shares Cin. Ports. Big Sandy & Pomeroy Pkt Co. at $6,900.00
35 shares Ashland National Bank at..... 3,500.00
9 shares Norton Iron Works at 9,000.00
63 shares Cin. Ports. Big Sandy & Pomeroy Pkt Co. at 6,300.00
10 shares Means, Kyle & Co. at 10,000.00

and do not like to go farther without the authority for which I wrote yesterday. Don't forget to write asking father to protect your notes at the Ashland National Bank, and better send another paper authorizing holding, selling or collecting on the collateral 220 shares M. N. Bank stock.

Yours truly,
John Means.

On February 21st, William, without having received John's foregoing letter of the same day, answered John's letters of the 16th and 20th, as follows (Rec. 115):

Cincinnati, Feb. 21st, 1888.

Dear John:

Yours of the 20th rec'd, and *I send you by this mail my note to Thomas W. Means or order, for $125,911.74.* Receipts for $700, $1,200 and $1,000, Feb. 10th, 11th and 18th respectively; and authority to dispose of securities, all as requested by you. I fully agree with your action in the premises, as the best preparation for the civil suits which are likely to follow. I regret to learn that father continues to grow more feeble, and that he can not again see his children unless an operation be performed to restore his sight. Every word you write on this subject only adds

to the oppression I feel in connection with my own calamities, which are much more crushing than I can express, and cause me to look with envy on anyone who is ready to lay down this life for the life to come. There is no language to express my sense of my condition, which I could even bear, were not others called upon to share the burdens. I do not like to be alone, yet it would appear as 'twere better for all who are near and dear to me that my troubled existence should end in absolute isolation.

Affectionately,

William Means.

The note referred to in the above letter is the note for $125,911.74, already copied (ante p. 7). The receipts are as follows (Rec. 357, 358):

Cincinnati, Ohio, 10th February, 1888.

Received of Thomas W. Means by the hands of John Means seven hundred ($700.00) dollars on account current.

William Means.

Cincinnati, Ohio, 11th February, 1888.

Received of Thomas W. Means by the hands of John Means twelve hundred ($1200.00) dollars on account current.

William Means.

Cincinnati, Ohio, 18th February, 1888.

Received of Thomas W. Means by the hands of John Means one thousand ($1000.00) dollars on account current.

William Means.

John answered William's letter to him of the 21st, as follows (Rec. 361):

23d February, 1888.

My Dear Will:

Yours of the 21st inst., *note and authority to sell securities, came to hand last evening.* Am sorry that my reference to father's sight caused you trouble. He keeps cheerful and contented, walks out every day if good weather, some one taking his hand as he walks. Have explained to him my action in your affairs, amounts paid, how obtained, the advantage of saving securities

pledged from being sacrificed, &c., &c. He understands all, but soon forgets details so that have to explain again when next I see him and always ends by telling me to do as I think best for you. I wrote you not long since as to father's prize in Maggie as a daughter, and assure you that you have in her a sister to be proud of as well. Many here have kind words to speak for you—more than I can mention. With the many warm and able friends who have shown themselves in the past few days don't be discouraged, but cheer up for the sake of your family. I don't think they feel it a burden to share your trouble. It is not that we do for ourselves, but what we do for others will give us most pleasure to think of. Keep me advised of your needs for money and I will try to keep you from trouble on that account. Just now the amount borrowed engages my attention, but I hope soon to have under my control. Yesterday I paid a hundred thousand, so you see I am not in a hole. All well at home.

Yours truly,

John Means.

On February 23d William answered John's letter of the 21st as follows (Rec. 116):

Cincinnati, Feb. 23d, 1888.

John Means, Esq.,
Ashland, Ky.

Dear John:

Yours of 21st just received. Your requests are principally replied to in my letter of the 21st which of course had not come to hand when you wrote. I send herewith request to Thomas W. Means to protect my notes to Ashland Nat. Bank, maturing Feb. 21st, '88, for $6,000, and March 16th, '88, for $9,000, with authority to sell, collect, etc. Martha went out into the country this morning. All are reasonably well except myself, not being quite so strong as I could wish, and I am, with love to all,

Sincerely yours,

William Means.

The request to Thos. W. Means referred to in the foregoing letter is as follows (Rec. 462):

Cincinnati, February 23, 1888.

Thos. W. Means, Esq.,
Ashland, Ky.,

Dear Sir:

Please protect my notes given to and payable at the Ashland National Bank, Ashland, Kentucky, as follows: One maturing February 18-21, 1888, for $6,000, and one maturing March 13-16, 1888, for $9,000, for the payment of which, said bank holds as collateral security 220 shares stock in the Met. N'l Bank, Cincinnati, which you are hereby authorized to hold, sell or collect, at any place, either at public or private sale, at my expense, without advertising the same or otherwise giving me any notice.

Yours very truly,
William Means.

At this point it is convenient to state the circumstances leading up to the foregoing correspondence. We have first quoted the letters themselves to show that the note of $125,911.74 was delivered by mail, and that the delivery was unconditional.

William Means had been the president of the Metropolitan National Bank of Cincinnati. It failed and was put into the hands of a receiver on February 6, 1888. On the next day William Means was arrested by the United States authorities, charged with violating the National Bank Act (Rec. 212). On Friday morning, February 10th, his brother John Means, whose home was at Ashland, Kentucky, where their father, then 85 years old, also lived, arrived in Cincinnati, where he remained until Saturday evening, when he returned to Ashland. He found that William, who was out on bail, was indebted to the bank for about $125,000, secured by collaterals, a list of which with his estimate of their value ($187,800) William delivered to John (Rec. 356, 357).

It appears to have been thought advisable by William Means' friends, with whom John consulted, that William's debt to the bank should be paid, in the hope of affecting favorably the im-

pending criminal prosecution. John went home for the purpose of consulting his father and arranging to raise the necessary money, promising William to return in a few days. He did return, arriving in Cincinnati on Wednesday morning, the 15th, and on that day paid and took up William's notes at the bank. He left Cincinnati the same evening, and upon arriving at home the next day, February 16th, wrote the letter to William, quoted ante p. 7.

John Means raised the money to pay the bank by borrowing it on the notes of his father, Thomas W. Means, which he executed as attorney in fact for his father. $50,000 he borrowed in this way from David Sinton, $50,000 from Henry Hanna, both of whom were business friends, and the balance from John Russell, Margaret A. Means, and Mrs. Adams (Rec. 90, 158.).

The advancement accounts of the children on their father's books had been balanced and closed, as we have already said, four years before. John accordingly opened a new account on those books with William Means, which he entitled "William Means' current account," and in order to further distinguish it from the advancement account wrote over the latter in red ink, as well as over the advancement account of each of the other children, "advances." John first referred to the current account in his letter of February 20th, to William (ante p. 8), and on March 9th (see his letter of that date to William, Rec. 364), gave the latter a detailed statement of his entries on his father's books, saying:

"*I have opened the current accounts to keep separate from accounts of advancements to us.* . . . I would like to know whether what I have done in the matter is satisfactory to you; or have your suggestion to make as to changes in shape of accounts, etc., etc."

To which William answered on the 15th (see his letter, Rec. 116):

"I can not now make you any suggestions as to your manner of keeping accounts, which I doubt not are in every way as they should be."

John Means testifies as follows (Rec. 148):

X-Q. 1513. Did you have any conversation with your father with respect to taking notes from William Means for the money which was paid to or for him after the failure of the Metropolitan Bank?

A. I did have a conversation with him about it, and told him I thought it would be better to close it by note; that the note would show different from what it would if it was a simple account; that I was not sure from the construction of his will what an account charged might be, and I thought it was a matter of better assurance to take the note.

X-Q. 1514. What, if anything, did your father say?

A. He assented to it, and after hearing my reasons, said to do as I thought best. If I thought that was the best way, why he was satisfied to do it in that way.

X-Q. 1515. Did William Means have a copy of his father's last will and testament?

A. He had.

X-Q. 1516. When did he get it?

A. I can not give the date, but I suppose it was not so long after the execution of it. I made a copy of it. He asked for a copy of it and I told father he wanted it, and made the copy for him.

Again (Rec. 153):

X-Q. 1566. State what, if anything, you said to your father with reference to taking a note from William Means for the amounts that he obtained after the failure of the bank in preference to a receipt.

A. I gave as a reason to him that a receipt or charge on his books, simply, would not have the same effect in law that a note showing indebtedness to him would; that my understanding of his will as he had made it, as he understood it, that it was better to take note than to have an account or receipt—to take a note showing evidence of indebtedness and the collaterals received or redeemed from the bank on sale to be applied as credit on the

note, keeping it as an indebtedness in the shape to indicate and show an indebtedness.

Thus it appears not only that the transaction was in fact a loan, and not an advancement, but that it was entered in a new and special account, and a promissory note taken for the express purpose of avoiding any doubt upon the subject, of all of which William Means was duly advised and to all of which he assented.

The Circuit Court made the following finding on this subject:

"In this case the various sums of money which were paid to and for the benefit of William Means, and for which he executed notes to his father, are not charged on William Means' account of advancements or advances, which was already open, but they were entered on another account called "current account," which was opened with the acquiescence of William Means, and for the very purpose, as he knew, to prevent any question being raised as to these debts coming under the provision of the fifth clause of his father's will." (Judge Barr's Opinion, Rec. 51.)

Evan F. Williams, counsel, friend and protege of William Means, and one of the plaintiffs, took the stand apparently for the purpose of testifying that John Means, on the evening of the day on which he made the payment of $125,911.74, had told him that he proposed to take a note from William Means for some other purpose than to represent a bona fide debt. But the court will notice that neither the counsel for the plaintiffs nor counsel for the defendants on cross-examination, were able to secure any definite answer from the witness as to what was said. The witness does indeed say that the note was "temporary," but the rest of his answer shows that he draws that conclusion from the letters in evidence, and that he was not undertaking to repeat anything John Means had said (Rec. 214, answer to question 96). He also says: "We agreed to have William Means sign that note for $125,000, so as to protect his interest in the estate against the attack of creditors," but he immediately adds: "At that time John Means had assigned over to him individually, as we thought,

sufficient securities to pay all he had paid into the bank" (ans. to ques. 115, Rec. 216), showing that the witness understood that the money had not been advanced as a gift, but was to be paid back. Again, he says: "The claim was not to be enforced against William Means. The note was given for his protection alone;" but he immediately adds: "Mr. John Means then had, as we thought, sufficient securities to pay him every dollar which he had put into the bank" (ans. to ques. 119, Rec. 217), showing again the witness's understanding that the money was to be paid back and that it was not a gift to William. Indeed on cross-examination the witness was compelled to admit distinctly that there was no conversation between him and John Means to the effect that the note was not to be paid (Rec. 237, ques. 383 to 389).

The witness repeatedly states that he supposed at the time of the alleged conversation that the money had come from John Means and not from Thomas W. Means (ques. 127-129, Rec. 218; cross-ques. 418 to 423, Rec. 241, 242). If so he could not have expected that it was a gift, nor could he have doubted the propriety of John's taking a note to evidence such an important transaction involving such a large payment of money. We know that the money did come from Thomas W. Means, and not from John, $100,000 of the sum having been borrowed that very day on notes of Thomas W. Means; which is of itself enough to discredit the whole story of Evan Williams' conversation with John Means, constructed, as it is, on the theory that Thomas W. Means had not furnished the money.

Nor was the witness able to explain how the fraudulent scheme at which he hinted was to be carried out, or how the note was to operate as a protection to William Means. This is the same witness who denied a letter which he was clearly shown to have written, and whose testimony on other points was proved by abundant evidence to be false, as the Circuit Court of Appeals

substantially found, in refusing to accept as true his account of the settlement of October 16, which was denied by three witnesses (Opinion, Rec. 624).

William Means was not called as a witness. The presumption is that his testimony would not have supported the plaintiffs' claim. He was in Cincinnati occupying the same room with Evan Williams while the latter was testifying, as we afterwards proved by the testimony of the hotel clerk (Rec. 586). Counsel for the plaintiffs sought to conceal this fact when Evan Williams was on the stand, for he declined to answer as to it upon the advice of counsel (Rec. 311, 312).

William Means' notes were appraised as assets of the estate. A. C. Campbell, one of the appraisers, testifies that shortly thereafter he met William Means, who asked him about the appraisement of the notes and the amount for which they had been appraised, and that witness told him that the appraisers had estimated them at par, and that William Means said it was right to so appraise them (Rec. 549, 550).

Evan Williams' letter of October 18, 1890 (Rec. 420), written by William Means, shows that both of those gentlemen understood the notes to be *debts* which had been settled by the agreement of October 16th, for they complain of an error in the calculation which they ask to have corrected.

Evan Williams uses many other expressions in the course of his testimony, which show that he understood the notes to be debts. For instance, speaking of the settlement of October 16th, 1890, he says (Rec. 316): "Now we have found out, as we think, that we did not owe the estate *that much money*," making it a question of the amount of the debt.

But if we give all the effect that may be claimed by opposite counsel to the testimony of Evan Williams, concerning his conversation with John Means on the occasion in question, it is the

testimony of a single witness flatly contradicted by the testimony of another witness, and that too of a witness called by the plaintiffs themselves. John Means testifies (Rec. 626):

Q. State what was said by you on that trip up the river, if anything, in any conversation between you and Evan F. Williams, with reference to the purpose of taking the $125,000 note.

A. I told him I expected to take Williams' note for the amount paid to protect my father's interest for the payment of this money —to protect him or his estate.

Q. 36. Mr. Williams has testified that you said you proposed to take that note for the purpose of protecting William Means' interest in the estate against creditors, or substantially that; what, if anything, did you say in that respect?

A. I said it was to protect my father's interest or to protect his estate. I did not tell him that it was to protect William Means. I did not tell him; don't think he so understood me; did not think he understood it so then, and I do not think now that he understood it so.

But it is said that there are expressions in John Means' letters to his brother William which confirm Evan Williams' story.

After reaching home on the day following his payment of the $125,911.74, which was also the day after the alleged conversation with Evan Williams, John Means wrote his brother William three letters before receiving an answer from William. Letter of February 16th (ante p. 7), 20th (ante p. 8), and 21st (ante p. 9), in the last of which, not having heard from William, he stated that he was going to New York on the following Saturday and expressed his "desire to have the note to father [for which he had asked in each of his two preceding letters], and to make proper entries on his books and my own before leaving here," adding, "I do not like to go farther without the authority [the power of attorney to sell the collaterals] for which I wrote yesterday."

Again it is said that John's statement in his letter of the 16th

(the letter in which he first asked William for the note ante p. 7) that he and Evan Williams had agreed that that was the "best way to close up the matter at present," indicates some sinister purpose and suggests that the note was requested as a sham. But neither the expression itself nor anything that John did justifies such an inference, for we know from his letter of the 21st that his desire was simply to have the matter closed promptly and proper entries made on his father's books, and we know from the books themselves, which are in evidence, that he did make regular and proper entries, charging the note to bills receivable account, and that on March 9th he reported the entries in detail to William Means (Rec. 363).

The entry on the journal of Thos. W. Means (p. 180), under date of Feb. 22, 1888, which is the day he received Williams' letter of the 21st, enclosing the note is as follows:

Bills Receivable		$125,911.74
To John Means current account		$125,911.74

For note of William Means, dated and due 15th Feb., 1888, in my favor, No. 215.

In John Means' letter to William of the 20th (ante p. 8), he stated "that there will be need to sell some of the securities to get money to pay what we have borrowed," for he had borrowed, as we know, $100,000 from Sinton & Hanna, and accordingly he asked for a power of attorney to sell the collaterals, adding "I also think it best for you, fearing suits be brought against you and other directors, which may give you trouble as it now stands." This, doubtless, refers, as John Means testifies, to an apprehension that the sale of the collaterals and the payment of the loan might be interrupted by attachments at the suit of other creditors. But this apprehension justifies no suspicion of the bona fides of the transaction between John and William, nor does it indicate any disposition on the part of John to interfere improperly with the rights of any of William's creditors. He had raised the money for the very purpose of paying the bank, which was a creditor,

taking securities which, as it turned out, fell short of paying the debt by about $50,000.

In John's letter to William, of February 24th (Rec. 362), he gives a list of securities which William had handed him on the 18th. They were not the securities received from the bank, or held as collateral to the note for $125,911.74, but other securities handed by William to John three days later, as the letter itself states. It is to these securities and not to the note of $125,911.74, or to the collaterals attached to that note that the letter refers, in saying: "I think it may be prudent and safer to send me authority to dispose of *these*, like that sent in regard to the others. After the storm blows over we can arrange about them."

The storm in mind, as John Means testifies (Rec. 393), was the criminal prosecution, for William had already been arrested, and he was indicted the next day, February 25th.

The following is the conclusion of the Circuit Court on this subject (Rec. 52):

"I see nothing in the correspondence between the brothers John and William Means which indicates any other intention than that the moneys paid to William Means or for his benefit, in taking up his debts, etc., were to be debts to Thomas W. Means, and were to be paid out of William Means' share of his father's estate. There is no evidence of any other intention or expectation in the entire correspondence."

The following is a record of the loans other than that represented by the note of $125,911.74.

On the occasion of John Means' first visit to Cincinnati, February 10th and 11th, William Means applied to one C. M. Holloway for a loan of $2,000, offering as collateral 69 shares of steamboat stock (Rec. 98). Holloway declined the loan. Thereupon John handed William $1,900, and took the stock. As soon as he arrived home he opened William Means' "current account" on his father's books, debiting the account with the $1,900, and

crediting it with the stock at par, which was its market value. The entries are as follows, as they appear on Thos. W. Means' journal, under date of February 13, 1888 (pp. 178, 179):

William Means' currrent account	$1,900	
To Ashland N. Bank.—For paid John Means for L. Labrot $700, S. F. Hunt $1,200		$1,900
Steamboat Stock	$6,900	
To William Means' current account.—For 96 shares in Cincinnati, Big Sandy & Pomeroy Packet Co., as per certificate No. 222, dated 11th inst.		$6,900

John reported the credit in his letter of February 20th to William, and requested receipts for the payments, and also for another payment of $1,000, which he had made meantime on February 18th. William sent the receipts promptly (see his letter of February 21st, ante p. 9). The receipts are as follows (Rec. 357, 358):

Cincinnati, Ohio, 11th February, 1888.

Received of Thomas W. Means, by the hands of John Means, twelve hundred ($1,200.00) dollars, on account current.

William Means.

Cincinnati, Ohio, 10th February, 1888.

Received of Thomas W. Means by the hands of John Means, seven hundred ($700.00) dollars on account current.

William Means.

Cincinnati, Ohio, 18th February, 1888.

Received of Thomas W. Means, by the hands of John Means, one thousand ($1,000.00) dollars, on account current.

William Means.

The $1,000 referred to in the last receipt was duly entered on the journal under date of February 20th (p. 180):

William Means' current account	$1,000	
To Ashland N. Bank.—For John Means, 18th inst.		$1,000

February 24, 1888, John sent William $1,000 (see his letter

of same day, Rec. 362). William acknowledges the payment March 6 (Rec. 191), and encloses receipt (Rec. 358):

Cincinnati, Ohio, 18th February, 1888.

Received of Thomas W. Means by the hands of John Means, one thousand ($1,000.00) dollars, on current account.

William Means.

The amount is charged to William Means' current account, under date of February 24th (Journal, p. 181).

The foregoing credit of $6,900, for the steamboat stock, and debits of $1,900, $1,000 and $1,000 (in all $3,900), left a balance of $3,000 to the credit of William Means' current account, which John in his letter of March 9th, after reciting the entries, reports, saying "Thus you can see that there is due you now on current account $3,000 from T. W. M." (Rec. 364).

This credit balance of $3,000, together with a further credit of $5,000, April 2d (Journal No. 2, p. 183), arising from the transfer of 200 shares Ky. I. C. & M. Co. stock, from William to his father, mentioned in John's letters to William, of March 26, 1888, and April 2, 1888 (Rec. 366), was exhausted by the following payments subsequently made by Thomas W. Means, through John Means, to or for William Means, and charged to his current account.

April 2, Paid to C. W. Baker, Attorney, $1,500 (Jour. No. 2, p. 183).

April 21, Paid to S. F. Hunt, attorney $1,000 (Jour. No. 2, p. 185).

May 28, Cinti. draft to Wm. Means, $1,386.36 (Jour. No. 2, p. 186).

William Means requested this remittance in his letter to John, of May 26, 1888 (Rec. 186). See John's letter to William, enclosing the amount, May 28, 1888 (Rec. 368).

June 16 (Jour. No. 2, p. 186), 3 Cinti. drafts, $257.02, $123,-09, and $500.00.

These items were requested by William in his letter of June 14th (Rec. 119), and enclosed in John's letter to William, June 16th (Rec. 368).

July 13, New York draft, Dr. McClellan (Jour. No. 2, p. 187), $1,450.

John reports this payment in his letter to William, dated July 13, 1888 (Rec. 369).

July 28 (Jour. No. 2, p. 188), New York draft to S. F. Hunt, $500.

Aug. 10. Remitted to C'tesse. d'Adhemar, $195.84 (requested in William's letter to John, of July 27th (Rec. 120), and August 5th (Rec. 193).

Aug. 17 (Jour. No. 2, p. 189), Remitted to Emil Labrot, as per request of William Means' letter July 12 (Rec. 130), $1,369.-17.

There are some subsequent payments made to William and charged in his current account. The last was made December 20, 1888. It is not necessary to give them in detail. The account appears on Thomas W. Means' ledger, p. 223 (Rec. 334), and shows a debtor balance of $250.08 still unpaid.

The following is a list of the notes of William Means to the order of his father that were covered by the settlement of October 16, 1890, arranged in the order of their dates. The notes are given in full at pages 162 to 165 of the record:

Feb. 15, 1888, $125,911.74.
Mar. 19, 1888, $15,027.00.
Aug. 20, 1888, $5,041.67.
Sept. 25, 1888, $7,400.00.
Oct. 24, 1888, $2,100.00.
Nov. 9, 1888, $497.13.
Nov. 9, 1888, $75,000.00.
Nov. 17, 1888, $1,620.00.
Nov. 22, 1888, $45,000.00.
Dec. 3, 1888, $2,713.88.

We propose to take up now in the order of their occurrence, the transactions represented by these notes, other than the note of $125,911.74, which has already been fully explained.

On February 23, 1888, William Means, in pursuance of John Means' suggestion in his letter to William of February 21st, wrote to Thomas W. Means as follows (Rec. 462):

Cincinnati, February 23, 1888.

Thos. W. Means, Esq., Ashland, Ky.

Dear Sir: Please protect my notes given to and payable at the Ashland National Bank, Ashland, Kentucky, as follows: One maturing February 18-21, 1888, for $6,000, and one maturing March 13-16, 1888, for $9,000, for the payment of which said bank holds as collateral security 220 shares stock in the Met. Nat'l Bank, Cincinnati, which you are hereby authorized to hold, sell or collect, at any place, either at public or private sale, at my expense, without advertising the same or otherwise giving me any notice.

Yours very truly,

William Means.

On March 19th Thomas W. Means took up the notes of William Means, as requested, paying the Ashland National Bank $15,027 therefor. The following is a record of the transaction as appears on the books of Thomas W. Means under date of March 19, 1888 (Jour. No. 2, p. 183):

Sundries—To Ashland N. Bank	$15,027.00	
Bills Receivable—For notes of Wm. Means, viz: No. 216, one dated 16th Novem., 1887, @ 3 mos, $6,000.00; No. 217, one dated 10th Decem., 1887, @ 3 mos., $9,000.00		$15,000.00
Interest, on same		27.00
The notes secured by collateral, viz: 220 shares Metropolitan Natl. Bank of Cincinnati, O., see Certificates No. 57, 50 shares; No. 237, 37 shares; No. 294, 25 shares; No. 297, 82 shares; No. 312, 26 shares.		
See letter of William Means of 23d of Feb., 1888.		

No note was taken at the time from William Means. The foregoing entry indicates that Thomas W. Means treated the transaction as a purchase of William Means' note from the Ashland National Bank.

On October 15, 1888 (Rec. 166), John Means wrote to William as follows:

"As the intention of creditors to take judgment against you is apparent, they hoping to get them out of father's estate (your share), Moore and Hager advise me to take your notes in his favor at one day for payments made. That under his will as written it is doubtful whether we could hold claim on an account. Seeing and believing this would be true was what induced me to take counsel with them as to the will, which they have examined carefully and authorities relating thereto. *Make and send me your notes in father's favor*—viz: dated 20th August, '88 at one day $5,041,67—dated 25th Sept., '88, at one day $7,400, see his account—and note dated 19th March, '88, at one day $15,027.00 ($15,027.00) for paid your two notes to Ashland National Bank."

On October 22, 1888, William answered John (Rec. 187), saying:

"I enclose herewith some papers, including the promissory notes you asked for."

On October 24, 1888, John wrote William acknowledging the receipt of William's letter of 22d, "enclosing notes in favor of Thomas W. Means, $15,027, $5,041.67, $7,400, of sundry dates" (Rec. 375).

The foregoing request of John Means for these notes contained in his letter to William of October 15th, grew out of the fact that in the latter part of September, 1888, John had consulted J. F. Hager and L. T. Moore, attorneys, to whom he submitted a copy of his father's will. They had given John Means the advice mentioned in his letter of October 15th (see testimony of Hager, Rec. 573, 574), which William Means was in position to appreciate for he also had a copy of his father's will (Rec. 148).

William Means owed a note to the Circleville National Bank, which was secured by the pledge of 50 shares of the stock of the Metropolitan National Bank, certificate No. 171. In July, 1888, it appears to have been discovered that this certificate was an over-issue to William Means, as well as by the bank. John Means refers to this in his letter of July 28, 1888, to William (Rec. 370), saying: "Mr. Hunt [William's attorney] thinks it best to pay off the 50 at Circleville and surrender the certificate No. 171 to Mr. McConville, Agent. This is buying the certificate which it appears should have been surrendered and cancelled."

John, in his letter of August 1 to William, says, on the same subject (Rec. 371):

"The certificate No. 171, held by the Circleville bank is one which it seems should have been surrendered and cancelled. So Mr. Sanders, examiner, found, and also Mr. McConville and Edwards find."

William, before receiving this second letter of John, wrote him on the same day (Rec. 182):

"Yours of July 28th just received. I agree with you that certificate 171, Metropolitan Bank stock, should be paid and surrendered to Mr. McConville."

The same subject is referred to in John Means' letter to William of August 16, 1888 (Rec. 384), in which he says:

"Yours of 10th inst. is found on my return from Cin'ti, where I spent two days, mostly with Mr. S. F. Hunt. We are both decidedly of opinion that it will be best to pay the Circleville note and surrender the certificate No. 171 to Mr. McConville." S. F. Hunt, as heretofore stated, was William Means' attorney.

Accordingly, on August 30, 1888, Thomas W. Means paid the note to the Circleville National Bank, which amounted, with interest, to $5,041.67 (Jour. No. 2, p. 189). John, in his letter of Sept. 12th reports the transaction to William: "Have taken up the Circleville note and suppose Hunt has surrendered the certificate 171 M. N. Bank" (Rec. 384). The payment is entered

August 30, 1888 (Journal, p. 189). William Means' notes for this payment, and also for a payment of $7,400, were enclosed in his letter of October 22d to John Means (Rec. 187). They are entered on Thomas W. Means' books as follows: Oct. 24, 1888 (Jour. No. 2, 192).

Bills receivable	$12,441.67	
Wm Means' current % for his notes: No. 219, dated 20 Aug., 1888, a. 1 day		$5,041.67
No. — dated Sept. 15, a. 1 day		7,400.00

The consideration for the note of $7,400 is that amount remitted on account of a debt of William Means to George Gerke, as entered under date of Sept. 25, 1888 (Jour. No. 2, p. 191. Rec. 121, Ans. to Ques. 1207).

The consideration for the note of Oct. 24, 1888, for $2,100, is $500, paid to S. F. Hunt, on account of William Means, and $1,600 paid to George Gerke on account of William Means' debt. The payments are recorded in Journal No. 2, p. 192. John Means, in his letter of October 20th to William, reports the payment (Rec. 374): "I paid S. F. Hunt $500 to settle some debts for you, and to-day remit $1,600 to George Gerke on the syndicate debt. *Send me your note this day in favor of father for $2,100 for these payments.*"

William Means answers this by his letter of October 24th (Rec. 186):

"Yours of 20th just received. I note the payments you have made on my account, and send note accordingly, i. e.:

To Samuel F. Hunt, my %	$500.00
To George Gerke, my %	1,600.00
	$2,100.00

Please find my note this date to order of Thomas W. Means, payable one day after date, for $2,100."

The note was duly entered on the books of Thomas W. Means as follows: October 24, 1888 (Jour. No. 2, p. 193).

Bills receivable	$2,100.00	
To William Means' current %		$2,100.00
For his note at 1 day, No. 221, dated 24th Oct., 1888.		

The consideration for the note of November 9, 1888, $497.13, was $197.13 remitted to C'tsse D'Adhemar on account of William Means' debt to her, charged October 24, 1888 (Jour. No. 2, p. 192), and $300 paid to Mrs. William Means, by request of William Means on November 6, 1888 (Jour. No. 2, p. 193).

The note of November 9, 1888, for $75,000 is the note requested in John Means' letter of November 3, 1888, to William (Rec. 394). The written agreement upon which the payment of $75,000 was made to McConville, agent, is found on page 124 of the record. This note and also the note of November 9, 1888, for $497.13, were delivered by William Means to John Means, at New Haven, where William Means was staying at the time and where John visited him. There is no evidence in the record to contradict that of John Means, who testifies to an absolute and unconditional delivery of the notes (Rec. 91). They are entered on the books of Thos. W. Means as follows: November 16, 1888 (Jour. No. 2, p. 193).

Bills receivable to sundries	$75,497.13	
William Means' current % for his note (No. 222) dated 9th inst. @ 1 day,		$497.13
John Means' current % for note of William Means, dated 9th inst. @ 1 day, No. 223		75,000.00

The consideration for the note of November 17, 1888, for $1,620, is that sum paid by Thos. W. Means for account of William Means, reported in John Means' letter of November 19, 1888 (Rec. 376):

"I remitted to S. F. Hunt sixteen hundred and twenty ($1,620) dollars, 17th inst., to pay premium on life insurance policy in New York Mutual Life Insurance Co. *Send me note at one day in favor of father for that amount. Better use form by Moore and Hager.*"

William Means appears to have enclosed the note in his letter to John of November 22 (Rec. 196), without making any reference to the note in the letter itself, as appears from John's letter to William of November 28, 1888 (Rec. 376), saying: "Yours of 22d inst. is at hand, covering notes to father, namely $1,620, dated 17th inst., and one $45,000 dated 22d inst., for the Labrot matters;" which latter note is mentioned in William's letter of November 22d as being enclosed therein. The note is entered on Thomas W. Means' books under date of November 28, 1888 (Jour. No. 2, p. 194):

Bills receivable	$1,620.00	
William Means' current % for his note dated 17th inst., @ 1 day, No. 225		$1,620.00

The note of November 22, 1888, for $45,000 is the note, the receipt of which John acknowledges in the passage just quoted from his letter of November 28th, to William. The note is entered under date of Dec. 3, 1888 (Jour. No. 2, p. 194):

Bills receivable, to	$45,000.00	
Bills payable—For my note dated this day in favor of Margaret A. Means, @ 1 day, for which have received note of Wm. Means, dated 22d November, 1888, @ 1 day, to bear interest from 1st inst. For settlement as Exr. and Trustee of estate of A. Labrot, deceased (Wm. M's note No. 226)		$45,000.00

The consideration for the note of December 3, 1888, $2,713.88, and the request for the note are as stated in John's letter of December 3, 1888, to William (Rec. 377):

"My Dear Will: Herewith find N. Y. draft, fifteen hundred dollars ($1,500) for you, which I made payable to the order of Warren Higley, and to-day I sent twelve hundred ($1,200) dollars to George Gerke, to G. R. Dudley thirteen and 88-100 ($13.88), to pay Covington tax property of Eliza Labrot. *Send your note payable to father for amount of these*, viz: $2,713.88, *as per form given to you.*"

The note is entered on the books under date of December 8, 1888 (Journal No. 2, p. 195).

Bills Receivable, To.....	$2,713.88	
William Means' current % for note dated 3d inst., @ 1 day, No. 227		$2,713.88

We have gone over every payment made to William Means, and over every transaction with him involved in this suit, thus fully and in detail, in order to put the court in full possession of all the facts, hoping thereby to make it clear that William Means' notes mean just what they say, and that they were delivered for the purpose of representing debts, as distinguished from the "advances" referred to in the fifth clause of the will.

The Circuit Court of Appeals says that the purpose to create a debt as distinguished from a gift must have been the "testator's purpose, and not that of another" (Opinion Rec. 615), evidently intending that John Means' purpose and understanding are immaterial. But Thomas W. Means, who was old and feeble, acted wholly through John, who was his agent, with full and ample power to do as he thought best. John Means' declarations to William, and his communications with him, as agent of his father, were therefore in law the declarations of his principal.

It is also said that the notes were almost all taken after the payments which they represent. But it will be remembered that John and William lived in different places and that there was necessarily a lapse of time between the payments to or for William and his return of the notes. We can imagine that John Means had a busy day in Cincinnati on February 15, but the moment he reached home he wrote to William, asking for the note of $125,911.74. Is its validity to be affected by the circumstance that it was not signed and delivered on the 15th, but a few dates later?

Upon this general subject the Circuit Court says:

"But it is said by learned counsel that these notes were always taken after the money was paid to or for the benefit of William Means. This fact, if true, does not lessen the effect of the execution and delivery of these notes, since William Means knew the

purpose of John Means was to prevent the money paid to and for his benefit coming under the provisions of his father's will. . . . He also knew when he executed and delivered all subsequent notes payable to his father, the purpose was to create a debt to be paid out of his share of the estate of his father, and not to be advances which would become gifts after the death of his father." (Opinion of Judge Barr, Rec. 51).

II.

Three of the notes are made express charges upon the legacy.

William Means' note of November 9, 1888, for $75,000, contained the following (Rec. 164):

"It is agreed as part of the transaction by which I have procured a loan of seventy-five thousand dollars upon the foregoing note, that the amount thereof and all interest shall be paid from my interest as devisee or distributee of the estate of Thomas W. Means. William Means."

Nov. 9th, 1888.

His note of November 17, 1888, for $1,620, was in the same words (Rec. 165): His note of November 22, 1888, for $45,000 had appended the following (Rec. 164):

"The above is for money loaned to me by Thomas W. Means, on account of my indebtedness as executor and trustee of the estate of A. Labrot, deceased, and it is agreed as part of the transaction by which I have procured a loan of forty-five thousand dollars upon the foregoing note, that the amount thereof and all interest shall be paid from my interest as devisee or distributee of the estate of Thomas W. Means.

November 22d, 1888. William Means."

Where a testator, after making his will, pays money to a general legatee, taking from him a receipt in full or partial discharge of the legacy, it is well settled that the receipt will be enforced, and the payment treated as a satisfaction of the legacy, complete or partial, as the case may be. Cowles vs. Cowles, 56 Conn. 240; Richards vs. Humphreys, 15 Pick. 133.

In cases of intestacy, receipts given for advancements are similarly treated. The authorities are cited in a note to section 551 of Thornton on Gifts and Advancements. Cushing vs. Cushing, 7 Bush, 259, is an instance in Kentucky. In Quarles vs. Quarles, 4 Mass. 680, which is a leading case, a son on receiving a conveyance of land from his father executed a deed of release of his future share of the father's estate. The court held that the instrument could not operate technically as a release, because it did not relate to a present interest, but the court enforced the release as evidence of an agreement on the part of the son to accept the land in satisfaction of his expectancy, and, as the court put it, "for the best reason in the world, because he had agreed that it should," 4 Mass. 687.

The Circuit Court of Appeals calls attention to the fact that the first note for $125,911.74 was not expressly charged against the legacy. But John Means put the debt in the form of a note, and about the same time opened William Means' "current account," all for the purpose, as we have already seen, of confirming the transactions as loans. It may be assumed, too, in view of the collaterals received with the note for $125,911.74, that no great loss was apprehended on that transaction. But when John was apprised by William's letter of July 12th (Rec. 130), of his obligation to the Labrot estate, and saw that large payments might be required on that account, for which William had nothing to pledge but his legacy, he consulted counsel; for we know from his next letter to William that he felt bound to "handle father's affairs with the care of an executor" (Rec. 369). The advice which he received is thus stated by Mr. Hager (Rec. 573):

"Mr. Means at that meeting produced a letter from his brother William, dated in July and referring to the condition of the Labrot Trust in his hands, and asking financial aid and assistance. We considered the provision of the fifth clause of the will of Thomas W. Means, and, in view of the provision there, as to the

form in which a transaction should be had whereby William Means could obtain the money necessary to discharge that trust, and generally, the form in which the transaction should be placed to make the estate secure against any payments of money John Means might make for the benefit of William Means. The result of the conference was to advise John Means, and we did advise him, that in all subsequent dealings with William Means as agent and attorney in fact of Thomas W. Means, John Means should require the form of note and agreement attached, which I now hold in my hand and is in my handwriting. It is as follows:

Ashland, Ky., ——, 1888.

One day after date I promise to pay to the order of Thomas W. Means, the sum of —— dollars, value received, with interest from date.

It is agreed as part of the transaction by which I have procured a loan of —— dollars, upon the foregoing note, that the amount thereof and all interest shall be paid from my interest as devisee or distributee of the estate of Thomas W. Means.

"We advised Mr. John Means to use this form of note with the writing attached, *that it might clearly and beyond question, under any construction of the fifth clause of the will*, appear that the money so furnished his brother should be a loan, and in no sense an advancement under the terms of that will.

"I will state I can not give the exact date, but it was somewhere between the 22d and 25th of September."

John communicated this advice to his brother William in his letter of October 15, already quoted (ante p. 25), and it was in pursuance of this advice, and not for any improper purpose, that John took notes for certain previous payments, for which he held receipts on current account, and that he required William to execute notes on the form prepared by attorneys Moore & Hager, for future payments.

It is true that the consideration upon which the note of November 9, 1888, $75,000 was given, was paid by John Means to the receiver of the Metropolitan National Bank, eight days before

the note was delivered (Rec. 110, 124), but William, who was then at New Haven, Conn., was advised of the payment immediately, John saying in his letter of November 3, 1888 (Rec. 394):

"We hope to get dismissal, i. e., a nolle p. as result of our conference. If so, am to pay $75,000 to the agent of the bank's stockholders, and have deposited that amount with a trustee. Will explain when I come East.

"*Make your note at one day, favor of father*, $75,000, dated 1st inst. (the time I made deposit), *and give the note to Mary to hold until I come.* Expect to start Monday or Tuesday (5th or 6th) and to reach you Thursday or Friday.

"Hoping Maggie is much better and will be able to come home with me. I can not stay more than one or two days, and then must come home, and to Cincinnati. Don't be concerned about raising your bond. Saw Judge Sage about it and he explained kindly why he raised the amount."

We know from John Means' testimony that he did go to New Haven, as he proposed in his foregoing letter, and that William then and there ratified what John had done, and delivered the note and pledge absolutely and unconditionally (Rec. 111). John indeed had made the payment upon the advice of William Means' counsel, S. F. Hunt (Rec. 110).

The $45,000 note was made at a late stage of the proceedings for the purpose of raising money to settle William Means' defalcation to the Labrot estate, of which defalcation John was first advised by William's letter to him of July 12, 1888 (Rec. 130). It was after this and in connection with the advance which John was expecting to be called upon to make, to settle that defalcation, that he consulted attorneys, Hager and Moore, and received from them the advice already quoted. It was in pursuance of that advice and for the purpose distinctly stated in the paper drawn by Mr. Hager, that John required that paper to be signed by William Means. He enclosed it in his letter to William, of

November 16 (Rec. 375). On November 22 (Rec. 196), William returned the note and pledge executed, to which John replied November 28 (Rec. 376): "I wish to settle with trustee by giving Maggie's note or notes at such time as we can pay them, and to give her father's note, he holding your notes 45 M."

And the defalcation was settled in precisely that way. This was in pursuance of the purpose which John had expressed in his letter of October 20th, in which, referring to the Labrot defalcation, he said: "I think we can pay your debt, but I shall try to do so in such a manner that the amount shall not be a dead loss to ourselves nor to father's estate" (Rec. 374).

A new trustee had not yet been appointed for the Labrot estate. Until such appointment no settlement could be made, but it was important to be prepared to settle the moment a trustee should be appointed, and as Thomas W. Means might die any day, provision for raising funds was made by giving Thomas W. Means' note for $45,000 to Margaret Means, she agreeing to pay the Labrots. On February 28, 1890, John Means, out of his father's funds, paid Margaret the amount of the father's note, $45,000, with interest, $3,334.50 (Journal, p. 205, Record, 594), and she surrendered the note. Subsequently, on August 22, 1890, after her father's death she paid William's debt to the Labrots, amounting to $72,014.78, using this $48,334 50 as part of the payment so made (Rec. 199, 516).

Thomas W. Means does not appear to have taken any personal part in the transaction, or, indeed, to have known of it. He was on the verge of imbecility when the note was executed to Margaret, and a confirmed imbecile, under the care of committee and incapable of making a gift when the money was paid, February 28, 1890. What was done was done by John Means, as his attorney, and upon the distinct understanding expressed in writing between him, as such agent, and William Means, that the money advanced on that account should be returned out of William's legacy.

We submit that there is not a word of testimony in the record to justify the statement of the Circuit Court of Appeals "that the notes and instruments charging the legacy were intended to be operative only in case the creditors should proceed against the collaterals or for the purpose of subjecting William's legacy to the payment of their debts."

III.

The charges on the testator's books against his children referred to in the fifth clause of the will are advancement charges and not debts.

In construing the will it is of the first importance to try to place ourselves in the position of the testator, and to consult, for that purpose, the books to which he refers in the fifth clause, in order to ascertain the nature of the "advances" which he had in mind when he used that expression.

The Circuit Court of Appeals says: "There is no doubt that Thomas W. Means was accustomed to enter his charges in his books as denoting an indebtedness from the children to himself, or that he intended to continue that practice and to hold them as debtors. The will signifies as much when read in connection with his books, to which it refers" (Rec. 617).

We contend on the contrary that the charges to his children, to which the testator refers as having already been made, as well as those which he had in contemplation, and which he subsequently made, are charges of advancements, and not of debts, and that this is shown not only by the books themselves, but by clear and uncontradicted parol testimony.

James Bull, at one time the testator's bookkeeper, testifies as follows (Rec. 547):

"He kept an account with each of his children on his ledger, and whenever anything was paid out for them it went on these accounts, and he has told me that he intended after his death that

his property should be divided equally among all his children, that they should share alike, and he was keeping his record to show how much each one was getting from time to time."

The only other witness on this point is John Means, who also assisted in keeping the books. He was called by the plaintiffs. He testifies as follows:

"My father would say often, in handing me things which are charged, that he was giving me this. I understood it as a gift, and not as a debt to be paid back" (Rec. 144).

Again (Rec. 167):

"When he [Thomas W. Means] opened the first account he had made no will, and he contemplated to make the division of his estate among his children, and kept the account to show what each one had and after the making of his will he made no change in the account. He kept on just in the way it had been begun."

Again, the question being put by plaintiffs' counsel (Rec. 170):

"R. D. Q. 1704. As I understand your testimony on the cross-examination, Mr. Means, it is, in substance that your father intended originally to divide his estate equally between his children, and these charges against each of the children for money they received were to stand as charged against them, and were to be deducted from their portions of his estate. That, I understand, was his original intention. Is that correct?

"A. That is correct. That was his intention."

The books themselves, without parol evidence, show that the charges to which the testator refers in his will, were in fact advancements.

We find an account with each child opened on the testator's books. That of the oldest son, John Means, was opened January 22, 1855. At the top of the page, in the testator's handwriting, and signed by him, is the following statement (Ledger p, 19):

"This ac't and the ac'ts of Wm. Means and Mary Ann Adams are not to be charged with interest when final settlement is made —or at any time. Thomas W. Means."

On page 281, to which the account is carried in 1866, is written in the handwriting of some one else, but signed by the testator:

"No interest shall be charged on this account on final settlement or at any other time. Thomas W. Means."

The account of William Means (Ledger, p. 40) was opened February 6, 1885. There is no superscription over this page. On page 220, to which the account was carried in 1860, is written in the handwriting of some one else, but signed by Thomas W. Means:

"No interest shall be charged on this account on final settlement or any other time. Thomas W. Means."

The account of Mrs. Mary Ann Adams was opened (Ledger, p. 16) November 16, 1862. On this page there is no superscription. The account is carried forward in 1867 to page 287, over which on that page is the following statement in the handwriting of some one else, but signed by Thomas W. Means:

"No interest shall be charged on this account on final settlement or at any other time. Thomas W. Means."

Mrs. Culbertson's account (Ledger, p. 280) was opened September 18, 1866. It is all contained on that page. It is superscribed in the handwriting of some one else, signed by Thomas W. Means, as follows:

"No interest shall be charged on this account on final settlement or at any other time. Thomas W. Means."

The account of Margaret A. Means (Ledger, p. 320), the youngest child of the testator, was opened October 24, 1872. The ledger account is all contained on one page. This account is superscribed in the testator's handwriting, written in pencil and signed by him as follows:

"No interest to be charged on this act at any time. Thomas W. Means."

The first debit entry on the account of Thos. W. Means, Jr.,

the son who died in 1872 (Ledger, p. 306), is March 22, 1871. It is a short account. Over it is written in the testator's handwriting "This is not to be paid." There is no reason to suppose or suggested in the record that the testator meant to treat this son differently from his other children. He was a younger son. His account was opened nearly twenty years after that of John Means, and it is fair to assume that the testator's superscription over it—"This is not to be paid,"—was intended by him as the equivalent of the superscription over the other accounts.

In Hine vs. Hine, 39 Barb. 507, 512, a receipt from father to son for money which the son was "to account for without interest," was held to be the best evidence of an advancement.

Under date of December 9, 1873, the testator made and signed the following entry, Journal No. 2, p. 4:

Thomas W. Means, to sundries	$400,000.00	
John Means		$80,000.00
Wm. Means		80,000.00
Mary A. Adams		80,000.00
Margaret A. Means		80,000.00
S. J. Culbertson		80,000.00

For amount to reduce the balance against these accounts, having been given to my children. Thomas W. Means.

This seems to be a clear statement by the testator that the accounts represented gifts.

The two preceding entries made on the same day, and on the same page of the journal, are equally significant, viz:

Sundries to John Means	$23,400.00	
Mary Ann Adams, for this amount paid her		$11,700.00
Maggie A. Means, for this amount paid her		11,700.00
Sundries to Thomas W. Means	$10,543.01	
Mary Ann Adams, for bills paid last summer in California		$124.84
For bd. T. M. Adams, say		250.00
Magg A. Means, for bill in Cal. last summer		35.67
S. J. Culbertson, for 1-4 of Buena Vista Furnace lands and interest in business deeded to W. W. Culbertson some years ago		10,000.00

John Means' account at that time showed a debtor balance of $171,271.36, Mrs. Adams' account a debtor balance of $81,847.78, and Margaret's account a debtor balance of $70,415.68. In other words John was $89,423.58 ahead of Mrs. Adams, and $100,855.68 ahead of Margaret. The foregoing entry of December 9th, shows that John paid each of his sisters $11,700, out of his own money, towards equalizing them with him.

The charge of $10,000 to Mrs. Culbertson's account is equally significant. It shows that she was charged with that amount as an advancement on account of property given to her husband "some years ago." Of course she could not be charged as a debtor to her father with property given to her husband. But she could be and evidently was charged with the gift to her husband, as an advancement against herself.

Under date of July 2, 1879, we find the following charge to Mrs. Culbertson's account (Journal, p. 86):

Mrs. Jane Culbertson..... $27,683.21

For various items in % of Means & Co., paid on her house in Ashland, for construction, and for improvement of the grounds; N. B.—These are found in memo. by Thos. M. Adams, copied from books of Means & Co., and entered by order of Thomas W. Means, this day.—John Means.

Mrs. Culbertson had been dead for five years (Rec. 84). The entry was therefore evidently made not "to denote an indebtedness," but to keep a record as against her son, of what she had received by way of advancement. The Statute of Ohio, of which state the testator was then a citizen, provided that advancements to a child should be accounted for on distribution by its descendants. Rev. Stat. Ohio, sec. 4169. There is a similar entry under date of September 16, 1878 (Journal, p. 75), where the testator charges Mrs. Culbertson's account with $206.91 "for an old account standing on C. M. & Co.'s books, and charged to T. W. M."

On March 9, 1874, we find the following charge to William Means' account, which seems to indicate an advancement. Indeed the entry says: "these bonds given" (Journal No. 2, p. 13):

William Means, to sundries	$21,200.00	
U. S. 10-40 Bonds, for 18 bonds numbered as follows, viz: 2630, 5449, 17271, 17283, 17285, 17286, 21483, 18702, 50238, 83284, 101405, 101406, 101407, 101408, 101409, 105389, 107283, 95250, ea. $1,000, total		$18,000.00
For 4 bonds, Nos. 16064, 16579, 15581, 47607, each $500.00, total		2,000.00
Profit and loss for premium on same		1,200.00

These bonds given about last of October last.

On April 28, 1881, William got 63 shares of steamboat stock charged, on the next day, as follows (Journal No. 2, p. 117):

William Means, To Steamboat stock	$6,300.00	
For 63 shares Cinti, Portsmouth, Big Sandy & Pomeroy Pkt. Co. 28th inst.		$6,300.00

John testifies that he brought the certificate from Ashland to Cincinnati, where he handed it to William (Ans. to cross-question 1499, Rec. 146).

Under date of January 29, 1874, we find the following entry (Journal No. 2, p. 9):

Sundries to Norton Iron Works Stock		$30,000.00
Margaret A. Means, for 6 shares of stock	$6,000.00	
S. J. Culbertson, for 6 shares of stock, 3 to yourself and 3 to W. W. Culbertson	6,000.00	
Mary A. Adams, for 6 shares of stock	6,000.00	
William Means, for 6 shares of stock	6,000.00	
John Means, for 6 shares of stock	6,000.00	

N. B.—This leaves belonging to Thomas W. Means 23 shares, $23,000. See certificate No. 80.

This indicates on its face, not a sale of the shares for which the children became indebted to the father, but a distribution of property by the father among all of his children by way of advancement. Note that Mrs. Culbertson's account is charged with the shares given to her husband as well as with those given to her.

The same inference of advancement must be drawn concerning the following entry of May 24, 1897 (Journal No. 2, p. 85):

Sundries to Means, Kyle & Co. stock.		$40,000.00
Mary A. Adams, for 20 shares transferred to her 5th inst.....	$20,000.00	
Margaret A. Means, same.....	20,000.00	

It shows an advancement of 20 shares of stock to each of the testator's living daughters.

Under date of July 6, 1880, we find the following entries (Journal No. 2, p. 105):

Sundries, to Norton Iron Works "Stock".....		$24,000.00
M. A. Means, for 6 shares, at $1,000.....	$6,000.00	
M. A. Adams, for 6 shares, at $1,000.....	6,000.00	
William Means, for 6 shares, at $1,000.....	6,000.00	
John Means, for 6 shares, at $1,000.....	6,000.00	
Sundries, to Ky. I. C. & M. Co. "Stock".....		$40,000.00
M. A. Means, for 200 shares at 50 per s.....	$5,000.00	
M. A. Adams, for 200 shares at 50 per s.....	5,000.00	
William Means, for 200 shares, 50 per s.....	5,000.00	
John Means, for 200 shares, 50 per s.....	5,000.00	
Profit and loss on 800 shares, as above.....	20,000.00	

These entries plainly indicate, not a sale of stock by the testator to his children, but an equal distribution among them by way of advancement of 6 shares of Norton Iron Works stock, and 200 shares of Ky. I. C. & M. Co. stock to each. His will, which was executed fourteen days later (July 20, 1880), was probably in course of preparation at that time or at least in contemplation, and when he spoke therein of "advances" "charged on his books to his children," he doubtless had foremost in his mind the foregoing distribution and charge.

The next entry after the execution of the will is equally significant. September 4, 1880, Journal No. 2, p. 110.

William Means	$590.46	
To Ashland N. Bank, for 55 this amt.....		$590.46
Sundries, to John Means	$1,339.36	
M. A. Adams, for this amount		$202.52
M. A. Means, for this amount		968.65
Ashland N. Bank, for this amount		168.19

Above payments made to bring these accounts to even amounts.

It shows an equalization of advancement accounts, for the convenience of the bookkeeper, and since John was still ahead of the other children he made the necessary payment to each of his sisters and a payment of odd dollars and cents into his father's bank account, in order to leave his advancement balance an even thousand, $78,000.

John's letter of the same day to William (Rec. 391), and William's answer of September 8, 1880 (Rec. 392), are as follows:

Ashland, Ky., 4 September, 1880.

William Means, Esq.,
55 Fountain Square,
Cincinnati, Ohio.

Dear Will:

Herewith please find father's check on Ashland N. Bank, Five hundred and ninety 46-100 ($590.46) dollars, which he sends you to bring your account on his books up to even thousand. I pay Mary and Magg, and him, the amounts needed to bring Mary and Maggie's accounts up to even thousands. While I do not believe any of you have any feeling of jealousy or wrong that he has heretofore paid or *given* to me more than any other of his children, I do desire that his *distributions* shall be made hereafter so as to bring the rest of us up to the amounts paid myself. And as the girls have each received less than either of us you can very properly, and without selfishness, or appearance of it, advise him to this course, and I hope you will do so and not hesitate, because it may be to your own advantage at the same time. Hattie and Rose are in the mountains of Virginia, but we look for them home to-day.

Harry and Cook leave Monday for Marietta. All well.

John Means.

Cincinnati, September 8, '80.

Dear John:

Yours of 4th inst. enclosing advice and check on Ashland National Bank just received by me after several days absence at Yellow Springs.

I suppose the amount ($590.46) is proper to make balance even thousands, though I have no time as yet to examine it.

I approve entirely of your views as to bringing up those who have not received so much as we have, and will recommend it.

Mary and Emma Campbell are expected at Y. S. soon. My wife was quite ill yesterday, and I feel that her health is about as infirm as last year. The children are well.

I am, yours truly,

William Means.

These letters show that the charges of September 4, 1880, to the accounts of the children were not made to "denote indebtedness," but to record a distribution of money made by the testator among his children by way of advancement, and that it was so understood by all parties. They also clearly show that what had theretofore been charged on the children's accounts and the balances then standing on those accounts represented advancements and not debts.

The books show what was subsequently done in pursuance of John's suggestion that the children should be made equal.

Mrs. Adams received $39,632.55 from her father on September 22, 1881 (Journal No. 2, p. 120), which brought her within $154.55 of $180,000. She received nothing further until May 14, 1884, when she was paid $154.55, being the occasion on which all of the children were equalized at $180,000.

On June 27, 1882, we find the following distribution (Journal No. 2, p. 134).

John Means, to sundries	$15,000.00	
R. R. Bonds, for 5 L. & B. S. R. R. E. D. Bonds, 1 m. ea.		$5,000.00
Low Moor Bonds, for 10 Low Moor Iron Co. Va. Bonds, 1 m. ea.		10,000.00
Wm. Means, to sundries	$30,000.00	
Norton Iron Works Bonds, for 10 Bonds ea. 1 m...		$10,000.00
R. R. Bonds, for 10 Bonds, ea. 1 m.		10,000.00
Low Moor Bonds, for 10 Bonds ea. 1 m.		10,000.00

Margaret A. Means, to sundries	$32,000.00	
Norton Iron Works Bonds, for 6 Bonds 1 m. ea		$6,000.00
R. R. Bonds, for 16 Bonds, 1 m. ea		16,000.00
Low Moor Bonds, for 10 Bonds, 1 m. ea.		10,000.00

John testifies that he himself brought William's share of the distribution ($30,000 in bonds) from Ashland to Cincinnati, where he handed them to William "down in the Safe Deposit Company, in the old Lafayette Bank" (Rec. 146. Ans. to cross-question 1499). He was then asked (Rec. 146):

X-Q. 1502. When you gave William this $30,000 of property, what did you say to him and what did he say?

A. I told him that these bonds were from father as a gift to him. I told him what he had given the others.

Aside from a small payment of $551.01 to Margaret, on July 26, 1883 (Journal No. 2, p. 142), no advancements were made to any of the children after the foregoing distribution of June 27, 1882, until the final distribution of May 14, 1884, by which all of the children were equalized at $180,000. The entry of that distribution is as follows (Journal No. 2, p. 148):

Sundries, to Bills Receivable	$30,000.00	
John Means, for A. C. & I. R. Co., dated 11 March, '84, @ 1 yr., No. 90		$4,000.00
Wm. Means, the same (No. 91)		4,000.00
Margaret A. Means, the same (No. 86)		20,000.00
Margaret A. Means, the same (No. 92)		2,000.00
Sundries to Ashland N. Bank	$903.54	
Wm. Means, for check		$700.00
Mary A. Adams, for check		154.55
Marg. A. Means		48.99

N. B.—This is done to make these accounts even amounts.

A general view of any of the children's accounts confirms the deduction which we are bound to draw from the typical entries already quoted, that the accounts are advancement accounts.

Take William Means' account, for instance. The last credit

item in it is that of $80,000, December 9, 1873, when the account of each child was similarly credited. From that time on the account consists altogether of charges made to record advancements, the most important of which we have already mentioned. There is no entry of any other sort after December 9, 1873, down to the transactions of February, 1888, when the new current account was opened.

Margaret Means' account opens October 24, 1872, with a charge of $12,500 for 100 shares of stock of the Ashland National Bank (Journal No. 1, p. 395). She was then a girl of twenty, just out of school. It is hardly likely that she was buying this stock from her father. The books show no payment for it. About a month later we find her father charging her account with $12,000 for a note of that amount, made by the Union Bank at Marietta, O., to his order, which the journal entry states that he "endorsed to her" (Journal No. 1, p. 397, November 30, 1872).

In the following April we find her father giving her and charging to her account, $20,000 in cash (Journal No. 1, p. 402, April 19, 1873), which he would hardly have done if he had understood that she had bought the foregoing bank stock and bank note from him, and that she was indebted to him therefor.

Within a period of two years and one month after the opening of her account, during all of which time she was a young girl, living in her father's home, it shows that she received $84,331.35 in money and property from her father, all charged to her account on her father's books, but manifestly not for the purpose of "denoting an indebtedness."

The account of Thomas W. Means, Jr., a younger son, who died in 1872, shows only two debits, viz: March 22, 1871, $50,000, "for 50 shares stock in the corporation of Means, Kyle & Co., at $1,000 each" (Journal No. 1, p. 372), and $6,250, April 20, 1872, "for my check, this amount in payment of 50 shares Second National Bank stock ($100 each), at 25 per cent. premi-

um" (Journal no. 1, p. 386). Both of these charges are debit charges, similar to the charges which appear in the accounts of the other children, and which the Circuit Court of Appeals says were made to "denote indebtedness." But we know that that was not the purpose of the entries, but on the contrary, that they were made to denote advancements, as the following entry made by the father after the son's death clearly shows (Journal No. 1, p. 398, December 9, 1872).

Sundries, to T. W. Means, Jr.	$56,250.00	
William Means, for 10 shares stock in the corporation of Means, Kyle & Co., $1,000 each		$10,000.00
William Means, for 10 shares stock in 2d National Bank of Ironton, $100 each, and 25 per cent. premium		1,250.00
Mary A. Adams, same as above		11,250.00
S. J. Culbertson, same as above		11,250.00
Jno. Means, same as above		11,250.00
Margt. A. Means, same as above		11,250.00

The above entry is made to divide stock belonging to T. W. Means, Jr., deceased, equally among his heirs.

The foregoing entry is doubly significant, because it shows that the charges thereby made to the accounts of the other children, were not made to "denote indebtedness" from them to their father. The stock, as he states in the entry, was not his but theirs. They had inherited it from their deceased brother. They did not therefore become indebted for it to their father. The charge was evidently not made "to denote an indebtedness."

Mrs. Mary A. Adams' account was opened November 16, 1862 (Ledger, p. 16, Rec. 334). The account on that page of the ledger runs from Nov. 16, 1862, to July 17, 1867. There are no credit entries. The debit entries amount to $17,003.04. The following is the only large item: March 29, 1867, Journal No. 1, p. 324:

Sundries to John Kyle	$10,562.50	
Mary A. Adams For U. S. 5-20 Bonds, Jan. 31, 1886		$10,000.00
do do premium on do		442.50
do do Watch of Owens & Co. 29th Mar		120.00

It indicates plainly enough the gift of a watch and bonds, which are charged in her account, but not for the purpose of "denoting an indebtedness."

On May 14, 1873, the ledger (p. 287) shows a balance of $64,-805.94, standing against Mrs. Adams. If her father regarded this as a *debt* due from her to him we would hardly find the following entry, which appears under date of May 14, 1873 (Journal No. 1, p. 403), and plainly shows a gift to her of $3,000 in cash, and the repayment to her with interest of a loan of $600, which she had made to her father.

Sundries to Ashland National Bank	$7,640.00	
Margt. A. Means, For ck. this amount to John....		$4,000.00
Mary A. Adams For ck. this amount to John		3,000.00
do For ck. this amount to John in-payment of same amount borrowed from her in Sept. 1872		600.00
Interest, To M. A. Adams for use of the above $600		40.00

May 20th, 1870, the ledger (p. 287), shows a balance of $38-911.90 against Mrs. Adams. On that day Thomas W. Means executed to her his note for $4,165.44, and paid same with interest at 10 per cent. per annum, March 18th, 1872 (Journal No. 1, pp. 361, 384).

August 20th, 1870, the balance against Mrs. Adams was $39,-454.06 (Ledger, p. 287). On that day her father executed to her his note for $10,145.62, and paid same, with interest amounting to $1,606.38, April 25th, 1872 (Journal No. 1, pp. 365, 388).

The inventory of the real and personal estate of Thomas W. Means, May 3, 1890, by T. M. Adams, committee (Rec. pp. 429-433), shows that Mrs. Mary A. Adams held a note of her father, Thos. W. Means, dated Sept. 26, 1888, for $1,500. Her account on her father's books at that time, Sept. 26, 1888, showed a debit balance of $100,000. If Thos. W. Means regarded that balance as a debt he would hardly have thought it necessary to execute a note to her for $1,500.

Under date of May 14, 1873, we find the following entry, Journal No. 1, p. 404.

Margaret A. Means $4400
To Second National Bank. To ck. for J. T. Davis. The note of J. T. Davis for $4400 bearing interest at 10 per cent. and secured by mortgage on real estate was received for the above ck. and given to M. A. Means.

And under date of December 9, 1873, the following entry (Journal No. 2, p. 5).

Mary Ann Adams, To $4,400.00
Margaret A. Means, for J. T. Davis' note, see entry journal 404, page 14, May —, the note and mortgage having been made to Mary A. Adams, not to M. A. Means $4,400.00

These entries indicate a gift of the mortgage note to Mrs. Adams, which the bookkeeper erroneously charged to Margaret, afterwards correcting the entry by charging it to Mrs. Adams, to whom it had really been "given."

The testator makes no distinction in his will between the account of John Means and that of the other children.

Until 1882, Thomas W. Means lived at Hanging Rock, Ohio, across the river, and about eight miles from Ashland, Ky., where his son John lived. During that period John, as the evidence shows, acted frequently as his father's agent (Rec. 72). The books further show that John was a very careful and particular accountant, making the most precise entries of every transaction. Accordingly, we find in his account on his father's books such entries as these:

On August 1, 1881, he is debited with $50,000 (Jour. No. 2, p. 118). He explains in his evidence (Rec. 149) that he received this money from his father with which to buy for his father certain securities. When he bought the securities he credits his account with the payment made therfor, to wit:

1881, August 18 (Journal No. 2, p. 119).

Bills Receivable, to	$20,000.00	
John Means.		
For note of A. C. & I. Ry. Co. this date @ 1 day, with interest at 6 per cent., with 20 bonds of said Railway Co. as collateral security, Nos. 275 to 294 inclusive.....		20,000.00

and on December 25, 1881 (Jour. No. 2, p. 126), he credits himself with $30,146.37, which he paid "for 30 bonds of the Low Moor Iron Co., Va., Nos. 170 to 199 inclusive."

John Means did not become debtor to his father for the sum of $50,000, charged as above to his account. The money was simply placed in his hands as agent for his father; but in order to keep a record of the transaction, John entered the money as a debit on his own account on his father's books when he received it, and afterwards when he paid it out, for bonds purchased for his father, he made a counter-credit entry. According to the plaintiffs' claim, if Thomas W. Means had died before John had invested this $50,000, it would have become a bequest to him under the will. Such, indeed, would be the consequence under the decision of the Circuit Court of Appeals, for that court held that the charges in the children's accounts were made to "denote indebtedness."

There is a similar entry under date of October 10, 1872 (Jour. No. 1, p. 395), where John Means is charged with $47,597. The entry following is a credit of the same amount "for 44 $1,000 U. S. 10-40s bonds." The entry on its face shows plainly that John Means received from his father certain money with which to buy for his father certain bonds. He took the precaution to charge himself with the money on the books when he received it, and to credit himself again when he had purchased the bonds, as agent for his father.

John Means testifies that on the only occasion on which he borrowed money from his father he gave a promissory note, which he paid with interest (Rec. 148, 149).

When the balances were brought to even thousands in Sep-

tember, 1880, after the execution of the will, John Means' balance was $78,000. It is manifest that that balance, without undertaking to separate the items that had heretofore appeared in his account, was treated by his father as his advancement balance. In the typical entries which we have already quoted appear the principal items during the last 20 years of his father's life of the advancements made to John Means, in connection with those to the other children.

The Circuit Court made the following observation concerning the account of John Means (Rec. 50):

"John Means' account does include items which were neither advancements or advances, whatever may be the meaning of that word as used in the will, as he himself proves. Thus, he received $50,000 from his father, August 1st, 1881, to be invested, not for himself, but for his father. This item is charged to John Means, and he is credited by the subsequent investments. Such entries as these, made or directed by John Means are not inconsistent with the general statement that the several accounts were intended to show the advances made by Thomas Means to his several children, and the character of those advances which were not in the shape of notes, or money loaned and evidenced by written promises to repay him."

After the equalizing entry of September 4, 1880, already referred to, William Means' balance stood	$59,000.00
Subsequently he received the following advancements, making just $100,000, viz:	
1881. April 29. 63 shares Steamboat stock.....	6,300.00
1882. June 27. Bonds	30,000.00
1884. May 14. Note of the A. C. & I. R. R.	4,000.00
1884. May 14. Cash	700.00
	$100,000.00

The foregoing is all there is of William Means' account after the date of the will.

IV.

Debts due to the testator from his children are not forgiven by the fifth clause of the will.

If we have demonstrated that the "advances" made prior to the date of the will and charged on the testator's books were in fact advancements, the meaning of the fifth clause becomes plain. It must then read:

"Item 5. I have made advances [advancements] to my said children, which are charged to them respectively on my books, and I may make further advances to them respectively, or to some of them, and to my said grandson, which may be charged on my books to their respective accounts. I desire the equal provision herein made for said children, and the provision for said grandson to be a provision for them respectively, in addition to said advances [advancements] made, and that may hereafter be made, and that in the division, distribution and settlement of my said estate said advances [advancements] made, and that may hereafter be made, be treated not as advancements, but as gifts not in any manner to be accounted for by my said children and grandson, or any of them, or the issue of any of them."

The "advances" which the testator suggests that he may thereafter make are not described as other or different advances, but as "further" advances; that is advances of the same sort as those already made, and to be charged in the same way. We have seen that the "further advances" made by the testator were in fact all gifts.

The fifth clause does not mention debts or loans. Its purpose and effect is to declare that "advances made, and that may hereafter be made be treated, not as advancements but as gifts." It would have been superfluous and senseless to have said "*loans* made, and that may hereafter be made, shall not be treated as advancements," because loans never are treated as advancements. What he did was to take the precaution to say that neither past or future advancements should be treated as advancements, but as gifts outright.

The Circuit Court states the argument thus (Judge Barr's Opinion, Rec. 49):

"It is true the testator declares these advances are not to be treated as advancements, but why use this word at all unless the testator had in mind to limit such advances to such as would be advancements."

The question in the testator's mind was not between debts and gifts, but between advancements and gifts, advancements being a species of gifts which but for this clause of the will would have to be accounted for by the legatees as ademptions.

The fifth clause does not release anything or convert anything, or acquit anybody. It simply declares that something shall not be "accounted for" on a certain occasion, to wit: "in the division, distribution and settlement of my estate." This is the full force and only effect of the fifth clause. The language is appropriate as applied to advancements, for they are "accounted for" on distribution, but as applied to debts, it is senseless. Debts are "payable" when due to the executor. The testator does not say or suggest that debts shall not be paid to or collected by his executors.

The balances standing on the testator's books against his children at the time of making his will, although in form debtor balances, were in fact advancements, and not balances showing debts due to him from his children. This could have been proved by parol evidence in case of dispute, and is proved in this case, but the testator desired to put the matter at rest by a definite declaration in his will, and also to make it clear that future advancements to his children should not be regarded as ademptions of their legacies. But to say that all *debts* due the testator from his children at his death are forgiven, is another thing. If such had been the intention of the testator, instead of clause five, we would expect to find some such simple declaration as this: "I forgive all debts due to me at my death from any of my children." According to plaintiff's contention, that is what clause five amounts to. The fact that no such language is used is strong evidence that no such intention was in the testator's mind.

In Van Alstyne vs. Van Alstyne, 28 N. Y. 375, the will directed as follows: "I release and acquit all and each of my children from any charge I have made against them or either of them." The court held that this clause did not release a son from promissory notes executed to the father. Selden, J., says, at page 378:

"Without attempting to define precisely what claims would be embraced by the words used by the testator, 'any charge I have made against them, or either of them,' I am of opinion that they can not be held applicable to promissory notes. An interpretation which should make the release include notes, would of necessity extend it to all debts and liabilities of the children to the testator. If it was the intention to make the release thus general, no reason can be given why general words were not used, instead of the restrictive ones which were employed. This argument derives additional force from the use, in the previous sentence, of such general words, viz. 'all my just debts,' in the clause directing the payment of the testator's debts."

This argument is equally applicable to the will at bar, which also uses the general word "debts" in the second clause which directs that "all my just debts" be paid.

The word "advances" may doubtless be used in a particular instrument in a sense broad enough to include loans. But prima facie in a will or other instrument covering a parent's benefactions to a child, it means "advancements." In Waller vs. Todd, 3 Dana, 503, 513, the words "$1,000 advanced," used in a deed of trust from a father to his son, were held to mean, prima facie, advancements, and their meaning was restricted to that sense, because, as the court puts it at page 518, there was "no proof that the '$1,000 advanced' was a loan and not a technical advancement." In Barker vs. Comins, 110 Mass. 477, 488, the word "advances" used in a will, while not restricted to "advancements" within the meaning of the Massachusetts statute, was extended no further than "to include any benefits conferred upon his son by testator in his life-time, which he might reason-

ably consider to have been such an appropriation of his estate as, added to what he b[illegible]hed to him, *would make him equal with his other sons.*" [illegible]he first of these cases the word "advances" was restricted to technical "advancements," and in the second, while not restricted to technical "advancements" as defined by the statute (which covered only moneys entered in an account), it was not extended beyond benefactions in the nature of advancements, made with the intention of equalizing the testator's distribution of his estate among his children.

The construction claimed by the plaintiffs which makes advances, as used in the fifth clause, include debts and loans, should not be adopted, because it would involve all future business transactions between the father and any of his children in such hazard and uncertainty as to practically forbid them. For instance, if the father lent one of his children money (may be a large sum), both intending it as a loan to be repaid, and not as a gift, according to the plaintiff's construction, the accidental death of the father, a day before the payment or maturity of the loan, would convert the loan into a gift, contrary to the intention and expectation of both parties. And it would only be necessary for a child who had received money as a loan to be repaid, and not as a gift or advancement, who wished to convert the loan into a gift, to refuse payment and hold the loan open as a debt until after the father's death.

In Stokes vs. Weston, 142 N. Y. 433, it was held that "the law favors equality among the children in the distribution of estates, and in case of doubtful construction of the will, it selects that which leads to such a result."

It is important to bear in mind that the promissory notes covered by the settlement of October 16, 1890, were charged by Thos. W. Means on his books, not to the account of William Means, but to bills receivable account. In other words, they were treated as an asset, just as any other bills receivable held by him.

The Circuit Court observes on this:

"It is not to be overlooked in considering this [fifth] clause of the testator's will that the language is: 'I have made advances to my children, which are charged to them respectively on my books and I may make further advances to them. . . . which may be charged on my books to their respective accounts;' thus the testator clearly contemplated the exercise of his own will in the future and indicated the mode by which his will in that regard could be known, i. e., by the charges on his books to their respective accounts" (Opinion, Judge Barr. Rec. 50).

V.

The Circuit Court of Appeals erred in setting aside the settlement of October 16th.

The bill seeks to set aside this settlement upon the ground that it was made in fraud of the rights of the beneficiaries of the plaintiffs' trust, of which the bill alleges the administrators had notice at the time of the settlement. The Circuit Court of Appeals agrees with the Circuit Court in holding that this ground was not made out, saying in its opinion on the petition for rehearing (Rec. 624):

"This court did not find that there was any fraudulent combination between the administrators and William Means in making the settlement of October 16, 1890, to defeat the rights of the beneficiaries under the complainants' trust, and to that extent practically sustained the defendants' contention; but upon other grounds held that the complainants were entitled to recover the amount of the legacy."

In view of the rule of this court in cases where the Circuit Court of Appeals and the Circuit Court agree on an issue of fact, the question is therefore hardly open for debate.

In order to make out their case on this head the plaintiffs were obliged to show (1) that William Means had assigned or contracted to assign his interest in his father's estate to his wife and children *prior to October 16th, 1890*, and (2) that the administrators had notice or knowledge of such assignment at the time of the settlement. The plaintiffs failed to establish either fact.

THERE IS NO COMPETENT OR ADEQUATE PROOF OF AN ASSIGNMENT PRIOR TO OCTOBER 16, 1890, OF WILLIAM MEANS' INTEREST IN HIS FATHER'S ESTATE.

The plaintiffs offered no evidence to prove an assignment *prior to October 16th, 1890*, except the Greene county record, and the indefinite and ambiguous testimony of Evan Williams and H. P. Whitaker. But the Greene county record is inadmissible to prove the fact as against the defendants. For any such purpose it is *res inter alios acta*. Plaintiffs can not, as against these defendants, establish that there was a contract *prior to October 16th*, by producing proceedings in a suit to which these defendants were not parties. As against William Means, the plaintiffs might establish the fact by such evidence as they chose to offer, or by his default, or by his admission of the fact, but as against us who were not parties to the suit, who had no notice of it, and who had no right or opportunity to offer evidence or to cross-examine witnesses, the record and judgment are *wholly inadmissible* to establish that a contract was made between William Means and his family *prior to October 16, 1890*. Owings vs. Hull, 9 Pet. 607, 624; Hale vs. Finch, 104 U. S. 261, 265; Huiskamp vs. Moline Wagon Co., 121 U. S. 310, 320.

What is the other evidence? In his examination in chief Evan Williams was asked (Rec. 222):

Q. 154. Did you at any time prepare any paper purporting to be an equitable settlement in trust of the interest in expectancy of William Means in his father's estate, upon his family?

A. I did.

Q. 155. When?

A. I would rather not testify to that date until this afternoon. I need to refresh my recollection as to this. I will give you the date this afternoon, and after looking over some papers I will be able to fix the exact date.

Q. 156. For the present you can state whether it was prior or subsequent to the death of Thomas W. Means?

A. I think it was before Thomas W. Means' death.

Thereupon there was an adjournment until the afternoon session.

In the afternoon, the examination proceeded:

Q. 157. Mr. Williams, at the time of adjournment you suggested that you had some papers that would enable you to state the exact date when the first paper was drawn up as settlement. Have you been able to find the papers you expected?

A. No, sir.

That was the extent of his examination in chief. No explanation was offered of his failure to find the paper, and no further effort was made to have him prove the pretended contract between William Means and his family.

On cross-examination (Rec. 265, 266) he was asked when he first learned that there was some arrangement between William Means and his family to convey his interest in his father's estate to trustees for their benefit. He said that settlements were talked over by William Means and his children in his prosperous days, several years before the Metropolitan Bank broke. He then says that he once drew a deed which William Means signed, and being asked to produce it, he says (Rec. 266):

A. No. Can't produce it.

X-Q. 696. Have you any idea of what became of it?

A. I can not tell you.

X-Q. 697. Have you any impression?

A. I will look down in my satchel. I think it may be there with some of my papers.

He was then asked:

Q. 698. Did they accept it?

A. Substantially, they did. My recollection is, I think they wanted some formal changes. They accepted it, but wanted some formal changes. That was the way the matter stood (Rec. 266).

He was then asked why he should keep it after it was accepted

and, finding himself cornered, he evades an answer, but neither the deed nor the written contract are produced.

At pages 293, 294, he says that he was present at the conference when the contract was made at Xenia.

X-Q. 1018. Was that in writing?

A. I can not say whether it was put down at that time, but it afterwards was.

X-Q. 1019. When?

A. It is difficult for me to fix the date, but at any rate before Thomas W. Means' death, there were some papers executed and delivered.

X-Q. 1020. By whom?

A. By William Means.

X-Q. 1021. Who drew them?

A. I think Mr. Glidden, but I am not certain. Mr. Glidden, or Mr. Whittaker.

X-Q. 1022. Have you seen the papers since?

A. I do not recollect now of ever having seen them after his death.

But no papers are produced, and the fairy tale, if it needed refutation, is dispelled by the letter of the witness to J. F. Hager of October 18, 1890 (Rec. 420). The plaintiffs' claim is that the settlement between William Means and his family was in consideration of the adjustment of his wife's claim for alimony and the settlement of their family differences. But that letter shows that on October 18, 1890, she was still pressing her claim for alimony and threatening suit, and so makes it clear that at that time no adjustment had in fact been made between her and her husband. It must be remembered that William Means is one of the beneficiaries under the trust at bar, and that that letter, being in his handwriting, is competent evidence not only to contradict Evan Williams but as an admission of one of the beneficiaries. Indeed, Evan Williams testifies in this case that at the time of the settlement of October 16, "Madam (Mrs. Means) and the children were after us pretty hot" (Rec. 289).

Within two days after the settlement of October 16, 1890, this witness and trustee procured on behalf of himself and C. W. Baker mortgages conveying to them, respectively, the share and interest of William Means in the homestead property of Thomas W. Means, derived under the will and the subject of the trust, if one existed. Thereafter and during the pendency of this suit, in a suit pending in the Boyd Circuit Court, Kentucky, the liens of these mortgages were enforced, William Means appearing by answer therein, and omitting the liens so asserted. Subsequently this witness and trustee received proceeds of his mortgage lien as his own property. Securing and enforcing these liens is utterly inconsistent with the pretence that the share and interest of William Means had been previously assigned to his family (Rec. 319-20, 507, 582).

In his letter to his sister, June 15, 1891 (Rec. 460), William Means says: "The sensational slip from the Xenia Gazette, which you enclosed was no surprise, as I had already been informed of the petition filed, etc., both by Col. Williams and two friends in Yellow Springs;" and says that "you will probably learn through Col. Williams that that petition is false, as I never heard or thought of such a deed before father's death, and only through Col. W. afterwards." He says that Williams told him what was wanted of him, and he promptly refused to make it; that the whole scheme is to find a method of attacking the estate, and that the Greene county court had no jurisdiction, as he was not then a resident of the state.

In a letter of September 28th, in answer to Mrs. Adams' letter of 24th, enclosing copy of Xenia decree (Rec. 461), William Means says: "I am quite familiar with the status there. You have letter from me in June concerning the petition filed." He says that he has since learned that the decree was based entirely on the testimony of attorneys, and that Williams had sent copy of the decree.

THE CLAIM THAT THE ADMINISTRATORS HAD NOTICE PRIOR TO OCTOBER 16, 1890, OF THE PRETENDED ASSIGNMENT OF WILLIAM MEANS' INTEREST IN THE ESTATE IS DISPROVED.

But whether there was in fact a contract between William Means and his wife and children to assign his interest in his father's estate *prior to October 16*, the evidence fails to show that any notice or knowledge of such assignment or interest had been communicated at that time to the defendants. The claim is that notice was given by H. P. Whitaker to E. C. Means in March, 1890. But aside from the fact that E. C. Means had at that time no interest in the matter, being neither legatee nor administrator (for Thomas W. Means was not then dead), Mr. Whitaker's testimony shows on its face that he went to Ashland, not to give notice of a contract already made, but to get John Means' assistance to bring about an arrangement. Mr. Whitaker, who was not called at all until the close of rebuttal testimony, says:

"My sole object in going there, and the only object of my visit, was for the purpose of getting Mr. John Means to co-operate in bringing about and effecting the trust matter whereby Mr. William Means' family would have the benefit of his interest in his father's, Thomas W. Means, estate."

And again:

"I went there at the instance of the attorneys of William Means, and ourselves as attorneys of Mrs. Means and her children, after full consultation upon the subject, to, if possible, effect the execution of this trust with the consent of Mr. John Means, whom we considered to be the head of the family, and the acting agent in that matter of Thomas W. Means."

And again:

"I had no object in view other than that, and no other business except to see John Means and have a full talk upon the subject of his *co-operation in securing to the wife and children of William Means his prospective interest in his father's estate.*" (Rec. 595, 596.)

But John Means was away, and Mr. Whitaker did not see him. E. C. Means testifies that Whitaker distinctly disclaimed that any arrangement *had* been made with William Means, and said that he did not represent William Means, and did not know what William Means wanted. (Rec. 513-514.)

The burden to prove notice is upon the plaintiffs. One would expect notice in such an important matter to have been served in writing, or that some definite evidence of it would be preserved.

T. M. Adams, one of the administrators, testifies (Rec. 451) that he never heard that Mrs. Means or her children were claiming any share in the estate until the summer or fall of 1891, when, for the first time, he heard of the trust on which this suit is brought. E. C. Means, the other administrator, testifies (Rec. 499) that at the time of the settlement he had no knowledge or notice of any claim to an interest in the estate of Thomas W. Means by Mrs. Means or her children. He testifies to what took place between him and Mr. Whitaker in March, and adds, that never, until after the decree had been taken, did he hear that William Means had agreed to make a trust, or that it had been declared or existed. Mr. Hager, on whom Whitaker says he called at his March visit, testifies that he did not hear from Whitaker, William Means, Williams, or any other person, on October 4th, October 16th, or at any time prior thereto, of any claim or representation of the existence of a trust in the interest of William Means, in favor of his wife or children, and that his first information was obtained in September, 1891, from a newspaper statement that some sort of a suit had been instituted in Greene county, Ohio (Rec. 579-580).

John Means testifies, answer to Q. 1401 et seq.: I have no recollection that William Means ever wrote me that Mrs. Means was threatening to institute proceedings against him for support and for maintenance, or of having such information from him, and nothing from Mrs. Means for more than a year before my father

died. The first knowledge I had of any claim to William's share in the estate by his wife or children, or trustees for them, was in November, 1891, after the suit was commenced (Rec. 128).

Evan Williams undertakes to supply evidence of notice by intimating that it was given in Mr. Ellison's presence at the time of the funeral of Thomas W. Means, June, 1890 (Rec. 294-295). Asked if prior to signing the receipt, he mentioned to Hager, E. C. Means, or Adams, or any one in the presence of others that any interest of the children of William Means was about to be asserted or claimed against the executors, he said:

Why Mr. Hager knew it from that letter of October 20, which he says he received.

Q. 977. Which one do you mean?

A. That letter you have been asking about and you produced here the other day (Rec. 290).

3. Evan Williams' letter of October 18, 1890, to Mr. Hager (Rec. 420), is a complete answer to the claim that the administrators agreed to pay $25,000 in consideration of William Means' release of October 16th. T. M. Adams (Rec. 441), E. C. Means (Rec. 498, 499, 508, 509, 510-513, 514, 515), and J. F. Hager (Rec. 583) all deny that there was any such promise. The claim rests altogether upon the unsupported and discredited testimony of Evan Williams.

VI.

The ground upon which the Circuit Court of Appeals set aside the settlement of October 16th discussed.

The Circuit Court of Appeals, although finding against the plaintiffs on the case made by their bill, with respect to the settlement of October 16, nevertheless set it aside, upon the ground that the notes settled, having already been cancelled, upon a true construction of the will, there was in fact no debt to settle and consequently no consideration for the settlement, and that it

was therefore, as against William Means, constructively fraudulent, because made with administrators who stood in a fiduciary relation to him.

1. The *bill* does not allege that the settlement was a fraud upon William Means, but on the contrary, that it was the result of "a fraudulent combination *with* William Means," for the purpose of defeating the rights of the *plaintiffs*, to whom the bill alleges that William Means had theretofore assigned his legacy, and of which assignment the bill insists that the defendants had notice at and prior to the time of the settlement, "thereby intending to defeat the just claims of *these trustees* and their beneficiaries."

But instead of finding that the defendants entered into a fraudulent combination *with* William Means to defeat the *plaintiffs*, the Circuit Court of Appeals bases its decree upon the ground that the defendants took advantage of *William Means* and committed a fraud *upon him*. But that is not the case which the defendants were called upon by the bill to answer.

The rule is fundamental (because essential to the safe and orderly administration of justice), that a plaintiff is confined to the case made by his bill. This is especially true in cases of fraud. We do not mean that every detail of the fraud must be proved as alleged, but the plaintiff must state specifically the *nature* of the fraud upon which he relies and must establish *that* fraud to entitle him to relief. Otherwise great injustice may be done the defendant, for he is not called upon to meet any other than the fraud alleged. This case is a striking illustration. The Circuit Court of Appeals says that the circumstances of the transaction of October 16th, raise certain presumptions of unfairness *towards William Means*, and of advantage over *him*, which the defendants were bound to repel; which is true, if the defendants had been charged in the bill with taking advantage of William Means, or of committing a fraud upon *him*. But how

could they be expected to repel such presumption, when the distinct allegation of the bill is, not that they had defrauded William Means, but that they had conspired *with* William Means to defraud others, of whose rights they had notice. And how could the Circuit Court of Appeals properly convict the Circuit Court of error in failing to grant relief upon a ground which is not only not made by the bill, but which is inconsistent with the bill?

In Harrison vs. Nixon, 9 Pet. 483, 503, Mr. Justice Story said:

"Every bill must contain in itself sufficient matters of fact, per se, to maintain the case of the plaintiff, so that the same may be put in issue by the answer, and established by the proofs. The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations, the court can not judicially act upon them as a ground for its decision, for the pleadings do not put them in contestation. The allegata and the probata must reciprocally meet and conform to each other."

In Boone vs. Chiles, 10 Pet. 177, 209, Mr. Justice Baldwin said:

"A party is not allowed to state one case in a bill or answer and make out a different one by proof. The allegata and probata must agree. The latter must support the former."

In Foster vs. Goddard, 1 Black, 506, 518, Mr. Justice Swayne said:

"In equity proceedings the proofs and allegations must agree. A party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved."

In Grosholz vs. Newman, 21 Wall. 481, 488, Chief Justice Chase said:

"The recovery must be had upon the case made by the pleadings or not at all."

In Bartmess vs. Fuller, 170 Ill. 193, McGruder, J., said:

"It is well settled that a complainant must recover on the case made by his bill. He can not be permitted to state one case in

his bill, and make out a different case by his proofs. Allegations and proofs must correspond. Even though a good case may appear in evidence, yet, if it differs from the one stated in the bill, the bill will be dismissed."

Adams vs. Gill, 158 Ill. 190, was a bill to reform a deed, upon the ground, as alleged in the bill, that the mistake arose through the mere oversight of the attorney who drew the deed. The Supreme Court of Illinois reversed the decree of the Circuit Court, entered upon the basis that the deed was improperly drawn through fraudulent design. Wilkin, C. J., said:

"In other words, the complainants set forth one case in their bill, and attempted to prove another on the hearing, placing their right to relief on entirely new ground. In McKay vs. Bissett, 5 Gilman, 505, it was said: 'A complainant must recover on the case made by his bill. He is not permitted to state one case in the bill and make out a different one in proof. The allegations and proof must correspond; the latter must support, and not be inconsistent with, the former. Although a good case may appear in the evidence, yet, if it be variant from the one stated in the bill, the bill will be dismissed. The defendant has the right to answer and contest the case on which the complainant claims relief (citing cases). If the evidence makes a case variant from the one made in the bill, no decree should pass other than to dismiss the bill.' It is well said in Kellogg vs. Moore, 97 Ill. 287: 'The chief object of written pleadings is to distinctly inform the adverse party of the facts relied on for a recovery or a defense, so that he may admit or deny them, or question their legal sufficiency by a demurrer, exceptions or otherwise, as he may be advised by his counsel; and also to inform the court of the real points of difference between the parties to the suit, so as to enable it to intelligently pass upon and determine their respective rights. But if parties are not held bound by their pleadings, it is clear the very object of them would not only be defeated, but they would be used by unscrupulous litigants for the express purpose of misleading their adversary, and neither the court nor the parties could ever know to a certainty the points of difference till all the evidence is in, and hence no one could intelligently prepare for trial.'"

In Park vs. Lide, 90 Ala. 246, a wife's land having been sold under a mortgage, was bid in by her husband's brother, who afterwards conveyed to him. A bill was filed by the wife's heirs charging that the husband had paid the debt with the wife's money, and that the foreclosure was collusive. There being a failure to prove that the mortgage was not a valid and subsisting lien, it was held that relief could not be granted, on the theory that the husband had purchased in trust for his wife, entitling the heirs to compel a conveyance on repayment of his expenditures in removing the incumbrance. The court said:

"The allegations, in other words, are not sufficient to authorize the relief granted, nor is the proof sufficient to support the relief prayed. This state of things involves a variance between the averments and the proof which is fatal to the decree; the rule in this respect being especially stringent in those cases in which, like the present, the complainant relies upon the fraud of his adversary." Citing, among others, 1 Daniels, Ch. Pr. 36 et seq. 383; Wilde vs. Gibson, 1 H. L. Cas. 605; Glascott vs. Lang, 2 Phil. Ch. 310, 322; Story, Eq. Pl. Sec. 42, and note.

Eyre vs. Potter, 15 How. 42, was a bill filed by a widow to set aside a son's purchase from her on the ground of actual fraud and misrepresentation. At the hearing, she insisted that if active fraud had not been shown, the conveyance ought to be set aside on the ground that the son stood in a fiduciary relation to her, which forbid his purchasing at a price said to be grossly inadequate. To which the court answered:

"Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated." (15 How. 56.)

So at bar, the plaintiffs having charged a fraudulent combination between the defendants *and* William Means to defraud the *plaintiffs*, can not recover upon the ground that the transaction, for want or insufficiency of consideration, or because of the fiduciary relation of the defendants, was a fraud *upon William Means*, or that he made the settlement to his own prejudice, under mistake of law or misunderstanding of his rights. That is not the case alleged in the bill. It is not the case the defendants were called upon to answer, or to meet with proof. It is not the case that was before the Circuit Court, or the Circuit Court of Appeals, or which is before this Court. The plaintiffs' case must be found in their *bill*, and not in the brief of their counsel.

The fundamental rule is fairly and accurately stated thus in Kerr on Fraud and Mistake (Am. Ed.), 365:

"The fraud alleged must be set forth specifically in particular and in detail, so that the person against whom it is charged may have the opportunity of knowing what he has to meet and of shaping his defence accordingly."

And even if we accept the view of the Circuit Court of Appeals that the bill was one to recover a legacy, and that the settlement of October 16, was matter of defense, that defense was set up in the answer, and the plaintiffs, if they wished to attack it as a fraud upon *William Means*, were bound to charge in their bill the fraud upon which they relied. This they did and they are confined to the charge so made. Assuming the bill to be one simply to recover a legacy, its allegations with respect to the settlement of October 16, must be treated as the plaintiffs' replication to the answer. But the plaintiffs can no more allege one replication and prove another and different replication, than they can allege one ground of relief and seek to recover upon a different ground. The rule which requires the proofs to correspond to the pleadings applies as well to replications as to bills proper.

The following statement is taken from Langdell's Summary of Equity Pleading (2d Ed.):

"According to the original system of equity pleading, it was necessary for the plaintiff to file a replication in the following cases and for the following purposes:

"First, if the defendant set up one or more affirmative defences to which the plaintiff in turn had an affirmative answer, he was required to set this up in a replication" (p. 92).

After pointing out that special replications were abolished at an early day, the learned author says:

"Instead, however, of simply lopping off all pleadings subsequent to the answer, and leaving the case to be further developed by evidence without pleadings, the court of chancery preserved all the principles of the system intact, by requiring the plaintiff to insert in his bill whatever would formerly have appeared in a replication, and by requiring the defendant to put in his answer, whatever would formerly have been contained in a rejoinder. This object was accomplished by the plaintiff's amending his bill, if necessary; and then the defendant was required to answer the amendments. Or, if the plaintiff could anticipate what the defendant would set up in his answer, he could expedite his cause by inserting his replication in his bill in the first instance" (p. 94).

"If either plaintiff or defendant fails to set forth any affirmative matter in the bill or answer respectively, the consequence will be that he will not be permitted to prove it, no matter at how late a stage of a regular system of pleading it would properly have appeared" (p. 94).

2. But suppose the case decided by the Circuit Court of Appeals had been made in the bill. The settlement of October 16, 1890, was an adjustment of a claim then asserted by the administrators against William Means. The Circuit Court of Appeals was of opinion that upon a proper construction of the fifth clause of the will, the notes settled had in fact been forgiven, and that there was therefore no consideration for the settlement.

But to sustain a settlement it is not necessary that the claim compromised should have been good in fact. In Callisher vs. Bischoffsheim, L. R. 5 Q. B. 449, which is the leading English

case, the defendant being sued on a promise made in consideration of the compromise of a claim, set up that, at the time of the compromise agreement, nothing was in fact due to the plaintiff. But the court sustained a demurrer to the plea.

Blackburn, J., said:

"If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated."

Cockburn, C. J., said:

"If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. * * *

"It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it; in that case his conduct would be fraudulent."

In Smith vs. Farra, 21 Oregon 395, where there is an extensive review of the cases, English and American, the defendant was held to a compromise by which he agreed to pay $700 in settlement of a claim for breach of covenant of title and warranty of land, although his real liability (the purchase price with interest), was less than $400.

In Stewart vs. Stewart (6 Cl. & F. 911, 967), Lord Chancellor Cottenham quotes with approval the following words of Lord Hardwicke, in which he in turn was only repeating Lord Macclesfield:

"An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on the one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation for an agreement."

Grasselli vs. Lowden, 11 Ohio St. 349, 356, was a suit to enforce an agreement made in compromise of a claim. The defendant set up that the claim compromised was really not good, and that there was therefore no consideration for the compromise. The court said:

"It is obvious, that there was then a controversy between the parties, of which the issue was regarded by both as at least doubtful, whatever may be the present opinion of Grasselli or of his counsel; and this constitutes a sufficient consideration for the covenant."

"If the solemn compromise of the parties is made to depend on the question whether the parties have so settled the dispute as the law would have done, then it may be truly said that a compromise is an unavailing, idle act, which questions even the power of the parties to bind themselves." Fisher vs. May, 2 Bibb, 448.

Union Bank of Georgetown vs. Geary, 5 Pet. 99, involved an agreement under which the endorser of a note had waived all defence and permitted a judgment to go against her, upon the promise of the plaintiff that it would issue an execution immediately against the maker, who was represented to have property sufficient to satisfy the judgment. The plaintiff, having failed to keep its agreement by issuing execution, sought to escape from the consequences of its breach by insisting that the indorser had in fact no good defence and that her agreement to waive defence and suffer judgment was therefore no consideration. But this court held that the consideration was sufficient, even though one of its own later decisions showed that the defence of the endorser (which alleged the insufficiency of a demand made on the fourth instead of the third day of grace) could not have prevailed.

Mr. Justice Thompson said:

"It is unnecessary to examine whether this defence would have been available or not. The validity of the contract did not depend upon that question. It is enough that the bank considered

it a doubtful question, and that they supposed they were gaining some benefit by foreclosing all enquiry on the subject. . . . To permit a subsequent judicial decision on this point in their favor, as having a retrospective effect, so as to annul a settlement or agreement made by them under a different state of things, would be sanctioning *a most mischievous principle*."

But it is just this "most mischievous principle" that the Circuit Court of Appeals sanctioned when it permitted William Means or his assigns to repudiate the settlement of October 16th, because that Court was of opinion that the claim of the administrators, which he then settled, could not have prevailed if contested.

3. It is of course otherwise if the person getting the benefit of a settlement knows at the time that his claim is unfounded. In that case, to use the language of Cockburn, C. J., in Callisher vs. Bischoffsheim, "his conduct would be fraudulent." But there is no ground either alleged or proved for such an imputation against the defendants. The Circuit Court of Appeals, to be sure, held that William Means' notes had in fact been forgiven by the fifth clause of the will, but the circumstance that the Circuit Court, after full hearing and upon great deliberation, held otherwise, is of itself a sufficient answer to any suggestion that the administrators were guilty of fraud or bad faith in believing and insisting that the notes were valid claims which they, as administrators, were entitled to collect from William Means. In Crescent Live Stock Co. vs. Butcher's Union, 120 U. S. 141, it was held that a judgment in favor of a plaintiff in a circuit court of the United States is conclusive proof of probable cause, although contrary to a former decision of a state court and although reversed subsequently by the Supreme Court of the United States.

Moreover, whether the notes were forgiven by the will depended upon the construction of the fifth clause, which was peculiarly a question of law upon which the administrators (being

laymen) were obliged to rely on the advice of counsel, and the court will not assume that the counsel who advised the administrators that the notes were valid and enforceable debts of the estate against William Means, acted in bad faith.

4. It seems clear therefore that the Circuit Court of Appeals was not warranted in setting aside the settlement of October 16th, simply because that court was of opinion that the administrators could not have succeeded if they had sued William Means on the notes, and that therefore the settlement, in the language of the opinion, "amounted simply to a gift to the administrators for the benefit of the other legatees." That is what happens every time an alleged debtor settles a claim which could not have prevailed. It is precisely what happened in Callisher vs. Bischoffsheim (where the demurrer to the plea admitted that the debt compromised was in fact no debt), and in Union Bank of Georgetown vs. Geary, where this court subsequently held that the defence compromised and withdrawn was, in truth, no defence.

The Circuit Court of Appeals says in its opinion that "no harm will come to the interests of others" if the settlement is set aside, evidently meaning that all parties will be restored to their status quo. But is that justification for setting a settlement aside? Is a settlement to stand only when the parties have settled the dispute as the law would have done?

The general policy of the law is quite to the contrary, being fairly stated in 1 Perry on Trusts, Sec. 185, with copious citation of authorities, as follows:

"When a conveyance is made to compromise claims which the parties deem doubtful, and especially if the conveyance has for its object the settlement of family controversies, courts will support it if possible, although founded in ignorance or mistake of facts, as well as of law; provided no fraud has been used to mislead and deceive the party executing the conveyance.'

5. But what is there to justify the action of the Circuit Court of Appeals in cancelling the settlement of October 16th, beyond the fact that, in the view of that court, the debt asserted by the administrators, and settled by William Means, under the advice of counsel, was in fact no debt?

The only other ground suggested by the court is that the administrators sustained the fiduciary relation of trustee to William Means. But *in respect of the settlement of a debt* asserted by administrators against a legatee, they do not sustain a fiduciary relation towards the legatee, but on the contrary a hostile position. No one but the administrator is competent to assert the claim. He alone represents the estate. If the claim is to be prosecuted he must sue and be plaintiff against the legatee as defendant. The assertion of a claim of *debt* in behalf of an estate against a legatee is necessarily, and in the nature of things, the assumption of a hostile position on the part of the administrator towards the legatee. Even in the case of a solicitor, whose fiduciary relation to his clients awakens the most jealous scrutiny of a court of equity, the rule is held not to apply when the solicitor is in the hostile attitude of a pressing creditor. Johnson vs. Fesemeyer, 3 D. & J. 13.

If the administrators had undertaken to purchase William Means' legacy, either for themselves or others, they would have gone outside of their duty and violated the rule which forbids a trustee from dealing with his cestui que trust. But that is not what the administrators did. They did not purchase or undertake to purchase or otherwise acquire William Means' legacy, either for themselves or for others. What they did was to prefer a claim of *debt* against William Means and to insist that it be recognized and settled. This was strictly in the line of their duty as administrators, assuming, as they then supposed, that the debt was a valid claim (and whether it was or not could only be determined by suit or settlement). The debt being recognized and settled it became as matter of law an offset against the legacy.

But the settlement of the debt had no other connection with the legacy. In respect of the claim of debt thus made by the administrators against Wm. Means upon his notes, they occupied no fiduciary relation towards him, but on the contrary a hostile position, openly and avowedly hostile. They represented an estate insisting that he was indebted to it. There was no confidence reposed and betrayed and no room for the operation of the rule which forbids dealings between trustee and cestui que trust. That is a rule of public policy intended to prevent transactions. It can not apply to a transaction in the line of the duty of an administrator. The circumstance that a debtor is also a legatee does not disqualify the administrator, or make him the legatee's trustee in respect of the debt.

We utterly deny the proposition upon which the decision of the Circuit Court of Appeals is based, that an administrator, *in respect of a debt asserted against a legatee*, is trustee for the legatee, especially when he deals at arm's length and the legatee is advised by independent counsel. We submit that the settlement of a claim under such circumstances has the same force and effect as if the alleged debtor were not also a legatee.

6. The Circuit Court of Appeals wholly ignored the fact (ordinarily supposed to be sufficient to sustain a transaction between trustee and cestui que trust, even where the trustee is dealing for his own benefit) that William Means acted under the advice of independent counsel (Rec. 349, 487, 488, 436, 439).

7. As bearing upon the suggestions in the opinion of the Circuit Court of Appeals that the settlement of October 16th was "induced" or "procured" by the administrators, or that they exercised undue "activity" in bringing it about, we submit the following as an entirely fair statement of the evidence.

The conference which resulted in the settlement was not invited by the administrators, but, on the contrary, by William

Means and his attorneys. No one testifies that the conference was proposed by the administrators. They both testify that it was not proposed by them (Rec. 475, 488).

The sequence of events is as follows:

On June 16th, eight days after the testator's death (and not before, as erroneously stated in the opinion of the Circuit Court of Appeals), William Means delivered his order of that date (Rec. 434) to T. M. Adams and E. C. Means, who had not yet qualified as administrators, although it was doubtless understood at the time that they were to be appointed. They were appointed on July 28th, but did not qualify by giving bond until July 29th. On that day (and not on the 28th, as erroneously stated in the opinion of the Circuit Court of Appeals) they made the endorsement which now appears upon the paper of June 16th (Rec. 578).

It is true, as stated in the opinion, that William Means, on July 28th, delivered to E. C. Means and Thos. M. Adams, before they had given bond or qualified, a notice of revocation of his paper of June 16th. But he accompanied such revocation with the following paper, which is not noticed in the opinion of the Circuit Court of Appeals:

Ashland, Ky., July 28, 1890.

Mr. E. Cook Means and Thomas M. Adams.

Gentlemen:

Mr. William Means has, after due consideration, *with full knowledge as to his legal rights*, notified you that he revoked a certain paper writing dated June 16, 1890, and that he withdrew all authority given by such paper.

Notwithstanding this revocation we desire to say on behalf of Wm. Means that he is ready and willing at any time to come to a full and amicable consideration and adjustment of his relations to the estate of his father, and either he or we as his counsel will be pleased to confer with you on the subject at any time.

Yours very truly,

Jordan & Jordan,

Evan F. Williams.

(Rec. 435-6.)

One of the signers (now deceased) was one of the most prominent, experienced, astute and aggressive members of the Ohio bar. The other, also a member of the bar, is one of the present plaintiffs.

The suggestion of conference made in the foregoing letter of William Means' attorneys resulted in nothing until October 4th, when William Means appeared at Ashland, accompanied by Evan Williams, one of his attorneys. There is not a syllable of testimony to show that this was in pursuance of any suggestion or invitation of the administrators, and they testify that they had no part in bringing about the conference of that day. Thos. M. Adams (Rec. 475), John F. Hager (Rec. 576), E. C. Means (Rec. 488), and Evan F. Williams (Rec. 288-9), testify to what took place on that occasion. They are the only witnesses upon the subject. Their testimony agrees that William Means and his attorney, Evan Williams, stated the object of their visit to be the settlement of William Means' debt to his father's estate, and to pay the estate what he owed it. They left requesting the account to be made up, and promising to return that night. The administrators did make up the account. Neither William Means nor his attorney returned that night, or, so far as appears, had any further communication with the administrators until October 16th, when William Means appeared at Ashland with Evan F. Williams and another attorney, C. W. Baker (Rec. 349, 350-1-2-3). The settlement of October 16th, resulted from that conference, which was participated in by William Means and both of his attorneys on the one side, and by T. M. Adams and E. C. Means' administrators and their attorney, John F. Hager, on the other side. There is no suggestion in pleading or proof of concealment, false representation, or other misconduct on the part of the administrators or their attorney, nor evidence of any influence exercised or sought to be exercised by either of them over William Means or his attorneys.

John Means took no part whatever in the settlement of October 16th. The record shows that he left Ashland prior to his father's death, and did not return until the following December. (Rec. 310, 127.)

If the administrators then knew or believed that the notes were not valid claims against William Means, there would be justification for the strictures of the Circuit Court of Appeals, but the court must place itself in the situation of the parties at the time. The administrators were advised by counsel that the notes were valid claims agaisnt William Means. They had been charged to the administrators in the inventory, with the knowledge and approval of William Means, as assets of the estate (Rec. 549-50).

Upon that assumption, it was the duty of the administrators to collect them, and they would have been guilty of negligence in failing to take proper steps to enforce payment or to secure the right of retainer against William Means, legatee.

The Circuit Court of Appeals says that the diligence of the administrators "excites suspicion that they were conscious of standing on dubious ground." They and their counsel undoubtedly did have doubt of their right to offset the debt against the legacy, and their activity was with a view to making the right of retainer certain. The case of Brown's Administrators vs. Mattingly, 91 Ky. 275, establishing such right of retainer for the first time in Kentucky, had not then been decided. The general right to offset the debt of a legatee against his legacy is not without doubt. Even the Circuit Court of Appeals seems to have thought the question sufficiently doubtful to justify the citation of many cases in its opinion in support of the proposition Rec. 613. There is, therefore, we submit, no ground to suspect that the administrators or their attorneys were "conscious of standing on dubious ground" on the question of *debt* or *no debt*, simply because they took care to compute and adjust the amount of the debt, and to secure the right of offset and retainer. To that extent alone their activity extended.

VII.

The Biil is not in fact one simply to recover a legacy. As such it can not be maintained because premature.

The Circuit Court of Appeals, although ordering a decree setting aside the settlement of October 16 (which seems to imply that the bill was one for such affirmative relief) took the position (when confronted with the suggestion on the petition for rehearing, that the case which they had decided was not the case made by the bill), that the suit was really one for the recovery of a legacy.

Such, we submit, is not the nature or scope of the bill. Nor can it be maintained as such, being premature.

The will provides that no final settlement can in any event be required before three years after the testator's decease (Item 7). The bill was filed before that time. In In-re Spencer (16 R. I. 25, 31) it was held that where a testator had declared that his executors "should have five years in which to settle his estate," a legatee could not maintain a suit for his legacy within that time.

VIII.

If Williams Means' notes evidenced obligations not canceled by the fifth clause of the will, the administrators are entitled to offset them against his legacy notwithstanding the assignment of his interest in his father's estate, under which the plaintiffs claim.

It seems to be settled in Kentucky, in accordance with the general rule of law on the subject, that an executor may set off a legatee's debt to the estate against the legacy, and that such right of set off can not be defeated by an assignment of the legacy. Brown's Adm'r vs. Mattingly, 91 Ky. 275; Ball vs. Townsend Littell's Sel. Ca's. 325; Jones vs. Taylor, 97 Ky. 201; Blackler vs. Boot, 114 Mass. 24; Howland vs. Heckscher, 3 Sand Ch. 519; Strong's Ex'r vs. Bass, 35 Pa. St. 333; Waterman on Set Off, secs. 189, 190, and cases cited; 2 Woerner on American Law of Administration, sec. 564, and cases cited.

We respectfully submit:

1. That William Means is not entitled to a double portion, but that his *debt* of $136,035.75 to his father's estate should be deducted from his legacy.

2. That the question whether he was entitled to such deduction was settled by an agreement between the administrators and himself, acting under the advice of counsel, and that no ground is presented by the bill or sustained by the proof for setting that settlement aside.

3. That the decree of the Circuit Court of Appeals should be reversed and the case remanded to the Circuit Court with directions to reinstate its decree.

LAWRENCE MAXWELL, JR.

JULIUS L. ANDERSON,
JOHN F. HAGER,
Of Counsel.

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